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757
No. 2143

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Testimony.
(For Transcript of Record, see Other Volume.)
(IN TWO VOLUMES)

GOLCONDA CATTLE COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

VOLUME I.
(Pages 1 to 304, Inclusive.)

Upon Appeal from the United States District Court for the
District of Nevada.

FILED
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Records of U.S. Circuit Court
of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Transcript of Testimony, etc.]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1166.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

GOLCONDA CATTLE COMPANY, a Corpora-
tion,

Defendant.

[Proceedings Had March 6, 1912, 10 A. M.]

Be it remembered, that this case came on regularly to be heard in the above-entitled court on Wednesday, the 6th day of March, 1912, at 10 o'clock A. M. of said day, before Honorable E. S. FARRINGTON, Judge of said court.

Mr. Samuel Platt, United States Attorney, appearing as attorney for plaintiff, and Mr. William Denman and Mr. Charles R. Lewers appearing as attorneys for defendant.

Whereupon the following proceedings were had, and testimony introduced: [1*]

The COURT.—This is the time set for the case of the United States against the Golconda Cattle Company, No. 1166; are you ready, gentlemen?

Mr. PLATT.—Ready on the part of the Government.

Mr. LEWERS.—If the Court please, we are ready with the exception of the presentation to the Court of a Motion to Amend the Answer, notice of which

*Page-number appearing at foot of page of original certified Record.

has heretofore been given, and which was, by reason of agreement between counsel, continued. We would like to take that up, but suggest that might be taken up after disposing of such matters as counsel for the Government may desire to present in connection with certain witnesses, whom I understand he desires to have excused at this time.

Mr. PLATT.—If your Honor please, concerning the amendment to the answer, probably we can give and take as to that. I have no objection to your Honor allowing or permitting the amendment as suggested by counsel. I think in the exercise of a discretion your Honor might permit such an amendment. And I desire in the same connection to suggest to counsel that upon an examination of the complaint and the answer, I find that these lands have been described in the bill of complaint as lying and being in the County of Humboldt, State of Nevada. The other suit which was instituted alleged that these lands were situated in the County of Humboldt, and I suppose by inadvertence the description was made erroneous in the complaint on file in this action. It should be in the County of Elko. Of course the township and ranges are accurately described, but I desire permission, through the consent of counsel, to amend the bill of complaint to that extent.

Mr. LEWERS.—Do I understand if we consent to that amendment that there will be no objection to the amendment we propose?

Mr. PLATT.—I have no objection, if the Court please. [2]

Mr. LEWERS.—That is agreeable to us.

The COURT.—Both amendments, then, will be allowed.

Mr. LEWERS.—Now, if the Court please, there is another matter that before we can state we are completely ready, I think should be disposed of at this time. In the bill of complaint in paragraph 4, page three, there is contained an allegation. (Reads:)

“Plaintiff alleges that a sufficient affidavit has been heretofore filed with the United States Attorney, for the District of Nevada, by a citizen of the United States, residing therein, that section 1 of Chapter 149, Act of February 25, 1885, United States Statutes at Large, is being violated by the said Golconda Cattle Company, defendant herein.”

In paragraph 4 of our answer, it is alleged: “That defendant is not informed as to the nature or contents of the affidavit, alleged in paragraph 4 of the said bill, to have been filed with the United States Attorney for the District of Nevada by a citizen of the United States residing therein, and therefore is unable to answer as to whether said purported affidavit was or was not a sufficient affidavit as required by the Act of Congress of February 25th, 1885. And this defendant prays that it be permitted to examine the said purported affidavit and that a copy thereof be furnished it.”

The provision of the statute is as follows, section 2 of the Act of February 25th, 1885: (Reads:) “That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States

that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure [3] may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit."

Now, that is one of the conditions precedent upon which the action is to be brought. It is alleged as a legal conclusion in the complaint that an affidavit was filed. We were unable, as stated in the bill, to answer that, not knowing the contents. We have not been furnished with a copy of this affidavit, or shown the original, although the demand was made in the answer, and a demand has been made a number of times personally upon Mr. Platt since, as the attorney for the Government. At this time, before entering upon the suit, we desire an order that either the original be submitted to us, or that a copy be submitted, so we may know whether or not a condition precedent does exist.

The Government is not entitled by reason of the fact it is the Government, or by reason of the claim of the confidential character of the communication, to prevent us from seeing something which by the statute is made a condition precedent to the bringing of this action, otherwise it would not be necessary ever to comply with the requirements of Section 2 of the Act of 1885, because the defense would have no right to see the affidavit, and therefore, it would

make no difference whether there was an affidavit; and we ask for an order at this time.

Mr. PLATT.—If your Honor please, this is the first time I have ever heard the request made in a court of law that evidence in the possession of the plaintiff, without a bill of discovery, should ever be submitted prior to the trial of the case, to the other side. It is true we have alleged here that [4] this action is founded upon an affidavit filed with the United States Attorney in conformity with the statute as just read to your Honor by counsel. That allegation was made to bring the action within the statute, in so far as a duty prescribed on the part of the United States Attorney may be concerned, and that that duty, and the privilege of bringing the suit, might be clearly expressed in the bill of complaint itself. Now, if the Court please, that is an allegation in the bill, and if it becomes necessary for the Government to establish that allegation by proof, the Government is ready to submit the affidavit in the usual order of proof in support of the allegation of the bill. If your Honor thinks it is proper evidence for us to submit an affidavit in evidence in accordance with the allegation of the bill, we are ready and willing to do that; but we don't think that under the issues joined upon this one allegation, that we should be compelled to submit, in advance of the evidence, this affidavit for the examination of counsel.

Mr. LEWERS.—If the Court please, Mr. Platt entirely misapprehends the purpose of this affidavit, and the purpose of our request.

The COURT.—What have you to say about it being necessary to proceed by a bill of discovery in a case of this sort, in an equity suit?

Mr. LEWERS.—I cannot understand what authority there is for requesting us to file a separate bill of discovery in order to get something, which by the statute is made a condition precedent to the bringing of the action. There is a purpose in requiring this, and that purpose is to prevent prosecutions or suits indicated being brought without sufficient foundation, just as it is provided in the statute that if less than 160 acres is enclosed there must be special authority from the Department of the Interior. [5] Now, under those conditions, where this is a part of his cause of action, we have asked in our answer, which is in the nature of a bill for discovery, we have explained that we could not plead to that portion of the bill because the bill does not set forth what it is, and have asked for a discovery, in the sense that the affidavit, or a copy, be furnished us so that we can plead whether or not there is a sufficient condition precedent to the bringing of the action. It is not that we are asking for it as evidence in the case, but as a condition precedent to the bringing of the action. And I don't think, with all due respect to the Government in this case, that it is a fair proposition to come in here, asking us to plead to a general bald conclusion that there is such an affidavit, when that statute, in terms, provides what that affidavit shall contain as a condition to the bringing of the action. And for that reason, and to determine that question, in order that we may determine whether we are

ready to enter upon a defense, it may be that we shall desire to amend our answer entirely if that affidavit does not conform to the statute.

The COURT.—Well, I don't think I shall make the order at present. It seems to me if the bill was defective, there was another method of raising this point. If you seek to ascertain what the testimony of the plaintiff is to be, and have a right to it, my impression is that it is not a notice to produce the document in a bill of equity, but it is a bill of discovery that entitles you to see that document. I am not perfectly clear about that matter, but I am of the impression that that is the rule, and as to whether that affidavit must be produced before this case is decided or not, I shall not decide that question at the present time. [6]

Mr. LEWERS.—We desire, of course, to be allowed an exception to the ruling of the Court at this time, so far as your Honor has not passed finally upon it. I understand your Honor does not intend at this time to finally pass upon the matter; it may be brought up later without trespassing upon your Honor's ruling.

The COURT.—Yes. I want to say, so far as the admission of testimony is concerned, in cases tried before the Court, it is my purpose to admit nearly all the testimony that is offered in good faith, unless it is clearly irrelevant and immaterial; and if there are any arguments to be made on its admission, I propose to leave those until the final argument. There are too many witnesses being kept here, and I do not care to delay, and usually those questions set-

tle themselves in the course of the trial.

Mr. PLATT.—If your Honor please, there is another matter that I think the record might disclose, by and through the consent of counsel. Your Honor will recall that in open court, I don't remember the exact date, but counsel for the defendant and counsel for the Government were present, and it was suggested by counsel for the defendant, that the Rule to Show Cause, made returnable in this action, whereby the question raised in the bill by way of injunctive relief should be thrashed out and argued before the Court, was, as I understand it, waived by counsel orally, and it was agreed then and there in open court, that the main issues involved in the case should be tried upon the trial of the case, and that no testimony should be taken upon the Rule to Show Cause. I think, if the Court please, in order that the record may stand clear, that the record should show this stipulation in open court by and between counsel for the respective parties, and that they also consent at this time that the Court in its decision upon this matter may decide the case upon the merits, regardless [7] of the fact as to whether the hearing upon the Rule to Show Cause was regularly had or not.

Mr. LEWERS.—My understanding of that is, and I think counsel will agree with me, that it was suggested by me that we hear the question whether they were entitled to a permanent injunction, that is, on the merits. That is all that is involved in this suit; nothing else is involved, and therefore it was not necessary for your Honor to determine when you

came to the trial of the merits, whether a preliminary injunction was necessary. That is all it was. We do not stipulate, and do not want to be understood for one moment agreeing, that there is anything else involved in this suit now, except the right to the injunction.

The COURT.—I don't really see what difference it makes, Mr. Platt. There is no application for any preliminary injunction, or any interlocutory order at the present time; and all you are asking for, as I understand it, is if you prevail, that an injunction be issued.

Mr. PLATT.—That is true, if the Court please, in the main; but your Honor will understand that there was a Rule to Show Cause issued, and it was made returnable upon a certain date. Now, either that Rule to Show Cause was heard, or it wasn't heard, and I desire that the record may clearly show why it was not heard, because it is a link, so to speak, in the chain of the case, which has been omitted and thrown out by stipulation of counsel. Now, counsel's statement that the only relief which we are seeking here is injunctive relief is not in accordance with the prayer of the bill. We are of course seeking a permanent injunction; that is true; but we are also seeking the abatement of the fences; and in addition to that, we are seeking compensatory damages for use of the Government land inclosed. [8]

Mr. LEWERS.—Where is that in the bill?

Mr. PLATT.—I think you will find it in the bill.

The COURT.—It don't seem to me it makes very much difference. If I had refused to give you that

injunction, and you had applied for it, and argued it, and produced your testimony, I would not be bound by that on the final decision. If on the testimony here it appears you are entitled to that injunctive relief, you are entitled to it, and must have it, notwithstanding the fact that the Court refused to give it to you heretofore. Of course, if you wish to make a statement and have it go in the record, that there was no hearing and the reason why no hearing was given, you can do so if you like, but it will not influence the Court in any manner in deciding the merits of this case.

Mr. PLATT.—I desire to state to your Honor that your Honor's statement as to the view of the law upon the matter is amply satisfactory to me. I did not desire to lose any point upon the proposition that the Rule to Show Cause was not heard; and if your Honor feels that the Government by not stipulating in open court or getting a straight up order upon the point, is entitled to go ahead upon the understanding, I have no objection. If your Honor is of that opinion, it is really the only ruling I desire in the matter.

The COURT.—I don't think there is any question on that, if I granted you an injunction, and on the final hearing the testimony convinced me that the order had been issued improvidently.

Mr. PLATT.—The suggestion was merely made by way of caution, if the Court please. Does your Honor desire the pleadings in the case read?

Mr. DENMAN.—I was going to suggest we want to take exception to one statement made by coun-

sel for the Government, concerning [9] the issues involved here. There is no allegation in the complaint of any damages, or any ad damnum clause. There is no common-law right of action set up by injury for the trespass. There is a prayer for an accounting, and I take it it is elementary, that a trespass by wandering animals, or otherwise, is not the subject for an accounting; so the Court has nothing before it in the way of a demand for damages, as in a common-law proceeding.

The COURT.—I do not think it is necessary, Mr. Platt, to read the pleadings. You can simply make a statement of the case, if you wish.

(The United States Attorney makes a statement of the case, and of the allegations of the bill.)

Mr. LEWERS.—We take it that your Honor has read the pleadings, so it will not be necessary for us to read the answer.

The COURT.—You may proceed, Mr. Platt.

Mr. PLATT.—Call Mr. Flocker.

Mr. LEWERS.—If the Court please, at this time we desire all of the witnesses in this case to be placed under the rule.

The COURT.—Very well, you may call the names of the witnesses.

(The names of the witnesses are called by counsel for plaintiff and defendant, respectively.)

Mr. PLATT.—I desire at this time, if the Court please, to make the objection that there is nothing in the law which authorizes the Court in an equity case to exclude the witnesses from the courtroom.

Mr. LEWERS.—The Court has the inherent

power to do that in any case.

The COURT.—I think it is a matter of discretion with the Court. [10]

Mr. PLATT.—Your Honor will give me the benefit of an exception to your Honor's ruling.

The COURT.—Certainly. You may swear the witnesses.

(The witnesses are sworn, instructed by the Court, and placed under the rule.)

Mr. PLATT.—If your Honor please, Mr. Cullom is an official of the Interior Department, and I desire him present in the courtroom.

Mr. LEWERS.—Well, that is true of several witnesses here, at least five, and witnesses whom the Government will depend very largely upon for testimony, as we understand it.

The COURT.—(After discussion by counsel.) I think we will get along better perhaps if each of you has the benefit of the counsel and assistance of one person in the courtroom, and I will make the order allowing each of you to name one that you desire, but the one that is named will be the only one that will be permitted to remain in the courtroom during the course of the trial, unless there is some further order made.

Mr. LEWERS.—We will name Mr. R. E. Tilden.

Mr. PLATT.—I will ask for Mr. Flocker, if the Court please. [11]

[**Testimony of Ira M. Flocker, for the Plaintiff.**]

IRA M. FLOCKER, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name. A. Ira M. Flocker.

Q. Where do you live?

A. 512 Custom-house, San Francisco.

Q. What is your occupation, business, or profession? A. Special Agent General Land Office.

Q. United States Government? A. Yes, sir.

Q. How long have you been a Special Agent of the General Land Office? A. Since June 19th, 1908.

Q. And you have worked continuously in that capacity since that date? A. Yes, sir.

Q. What was your occupation prior to that time?

A. I was assistant topographer in the United States Geological Survey.

Q. How long did you act in that capacity?

A. May 5th, 1905, to June 19th, 1908, with the exception of three months.

Q. What are your general duties as special agent for the Interior Department or the General Land Office of the Interior Department?

A. To protect public lands from illegal use, and prevent depredations on the public lands, and collecting the indemnity for swamp lands.

Q. Are you acquainted, Mr. Flocker, with what is commonly known as the so-called Squaw Valley Ranch, purporting to belong to the Golconda Cattle Company, which said ranch is situated in the County

(Testimony of Ira M. Flocker.)

of Elko, State and district of Nevada?

A. I am acquainted—

Q. Just a moment. [12]

The COURT.—Is not that Squaw Valley Ranch in both counties?

Mr. LEWERS.—No, it is entirely in Elko.

The COURT.—The Squaw Valley Ranch is entirely in Elko?

Mr. LEWERS.—Yes.

Mr. PLATT.—(Contg.) Purporting to be in township 39 north, range 47 east, and township 40 north, range 48 east, and in adjacent townships and ranges. I make the question general in order that it may be sufficiently comprehensive.

A. Yes, sir. But my knowledge is not very minute in respect to the ranch to the westerly of those townships.

Q. Did you have occasion at any time to visit what is commonly known as the Squaw Valley inclosure of the Golconda Cattle Company? A. I did.

Q. When did you make your first visit?

A. In September 7th, 8th and 9th, 1910.

Q. Who, if anyone, accompanied you upon that visit?

A. Harry W. Gray, at that time field assistant of the General Land Office, and R. F. Haws of Elko.

Q. And in what capacity did you make the visit?

A. In my official capacity to locate approximately the fence lines, in order to determine whether or not there was any vacant Government land inclosed by said fence lines.

(Testimony of Ira M. Flocker.)

Q. Did you locate the fence lines of the so-called Golconda Cattle Company Squaw Valley inclosure?

A. I did, approximately.

Mr. DENMAN.—I object to the use of the word “inclosure,” presuming that there was an inclosure there.

Mr. PLATT.—If the Court please, I use the explanatory term “so-called” for the purpose of facilitating the examination. [13]

The COURT.—Proceed.

Mr. PLATT.—(Q.) How many days did you spend in the examination of the fence line of that inclosure? A. Three days.

Q. And state whether or not these two parties about whom you testified, accompanied you upon the three days' examination? A. They did.

Q. After making that examination, did you prepare a plat, purporting to represent the line, the fence line, which you examined, and about which you have just testified? A. Yes, sir.

Q. I call your attention, Mr. Flocker, to a plat upon the blackboard, and I will ask you whether that is the plat you prepared? A. Yes, sir.

Mr. DENMAN.—Pardon me a moment. Are you referring to the first or second visit?

Mr. PLATT.—The first visit, the September visit.

Mr. DENMAN.—This is the plat for the September visit?

Mr. PLATT.—Well, I think, if the Court please, if counsel will indulge me, I will reach the point that he has in mind.

(Testimony of Ira M. Flocker.)

Q. Now, Mr. Flocker, did you ever again make a visit to the lands described upon that plat?

A. Yes, sir.

Q. Or the fence line described upon the plat?

A. Yes, sir.

Q. When did you make that visit?

A. April 10th and 11th, 1911.

Q. Were you alone? A. No, sir.

Q. Who accompanied you?

A. Fred Backus of Golconda.

Q. How many days did you spend upon that visit?

A. Two days.

Q. Did you ever again visit the so-called inclosure?

A. Yes, sir.

Q. When did you make that visit?

A. July 22d and 23d, 1911.

Q. Were you alone? A. No, sir. [14]

Q. Who accompanied you?

A. James W. Melrose, special agent of the Department of Justice, and Harry Petrie of the Golconda Cattle Company.

Q. How long did you spend upon that third visit?

A. Two days.

Q. This map which you testified you prepared, Mr. Flocker, if counsel will permit a leading question, embraces the result of the three visits which you made to that property? A. Yes, sir.

Mr. PLATT.—There will be no objection to that, I take it?

Mr. DENMAN.—The objection I have, that the word “embraces” does not clearly indicate anything.

(Testimony of Ira M. Flocker.)

What do you mean by "embraces," Mr. Platt?

The COURT.—Well, I think I understand it. If you are going to do that, gentlemen, this case is going to take too long.

Mr. DENMAN.—I don't think it is going to take very long. There will be a large amount we will admit.

The COURT.—I understand that this embraces the result of his work. The facts that he discovered on those three visits are on this map, so far as the map is capable of showing.

Mr. PLATT.—That was the intention of the question, if the Court please.

Mr. DENMAN.—I don't think Mr. Flocker meant to say that.

Mr. PLATT.—(Q.) As I understand, Mr. Flocker, this map embodies a representation by plat tracing and drawing, of the result of the three visits which you made to the ranch, and about which you have just testified?

Mr. LEWERS.—I would suggest that the witness be asked what the map does represent, rather than counsel testifying to what it is. We will get along much more rapidly.

Mr. PLATT.—I knew the question was leading, but I did it to save time. [15]

The COURT.—I will allow that question.

A. Yes, sir.

Mr. PLATT.—(Q.) Now, I wish, Mr. Flocker, you would explain in detail that map, and I think probably you had better step from the witness-stand, with

(Testimony of Ira M. Flocker.)

the Court's permission, and indicate with your lead pencil, or pointer. (Witness goes to map.)

A. This blue line drawn free hand, represents Rock Creek, as shown in the official plats of the United States Land Office. This line in blue, drawn free hand, Willow Creek.

Q. Running along the southern border of the plat?

A. Yes. Ivanhoe Creek comes in at this point, about the center of section 2, township 38 north, range 47 east.

Q. And is so designated upon the plat as "Ivanhoe Creek"?

A. Hot Creek, as shown on the official plats, runs into Willow Creek at a point near the center of section 35, township 39 north, range 48 east. The black outside line on the plat represents the approximate position of the fencing at the time of my first examination, or on September 9th, 1910. Those portions of the fence line marked with the small line on one side, show gaps, where the fence had been taken away at the time of my first investigation, approximately through the east half of section 36, of township 39 north, range 48 east, and through section 31 of township 39 north, range 49 east. Also another gap which is indicated by the same symbol, extended from a point about $\frac{1}{4}$ of a mile south of the quarter *quarter* between sections 17 and 20, township 39 north, range 49 east, to a place where the fence had formerly joined Nelson's fence, indicated upon the plat as such, in section 9 of the same township.

Q. And is Nelson's fence incidated upon the plat as such?

(Testimony of Ira M. Flocker.)

A. Nelson's fence is indicated upon the plat as such. The red [16] lines indicate fencing subsequently constructed, or constructed after my first visit.

Q. Upon what visit did you discover the fences erected, which are delineated upon the map in the red?

A. On my visit of April 10th and 11th, 1911, I found a new fence had been constructed, beginning at about the quarter corner of section 32, township 39 north, range 47 east, one-half mile, south one mile and east about two miles, joining the fencing south of Willow Creek, near the mouth of Ivanhoe Creek, section 2, township 38 north, range 47 east. Also that new fencing had been constructed from a point about one quarter of a mile north of the quarter corner between sections 28 and 33, township 39 north, range 48 east; thence a little north of east for about a half a mile, and thence close along the reservoir of the Golconda Cattle Company; and thence eastwardly for about four miles, where it turned in about the center of section 31, township 39 north, range 49 east, and extended north to Willow Creek, where it stopped.

Q. What is the scale of that map, Mr. Flocker?

A. The scale is two inches to the mile.

Q. Now, how much of the gap, beginning at the lower portion of section 36, and extending in an easterly direction therefrom, was closed up by the fence depicted in the red, and which you discovered had been erected upon your second visit?

A. The gap referred to by the United States At-

(Testimony of Ira M. Flocker.)

torney was about a mile and a half in length. The new fencing closed that gap, all with the exception of about a half a mile; the—

Mr. DENMAN.—I should like to have a question as to what the witness is going to state.

Mr. PLATT.—I submit I asked the question, to describe the lines upon the map, or asked him generally that, and I interrupted [17] him to propound this question as we went along, in order that the Court might be advised as to the point about which I interrogated the witness.

Mr. DENMAN.—What is the question now?

The COURT.—You may proceed in explanation of the map.

A. The red lines indicated, extending from a point about one-quarter of a mile south of the quarter corner between sections 17 and 20, township 39 north, range 49 east, and extending north about $\frac{1}{8}$ of a mile, thence east about, almost a quarter of a mile, and thence along the stream, just a small stream running into Willow Creek, the main stream, which enters the main stream at a point in section 29, about a mile and a half south; thence running north about a mile, and thence a little east of north for about a half a mile further, as indicated on the map, represents fencing which was built subsequent to my examination in April, but prior to my examination in July, 1911, closing up one of the original gaps mentioned, with the exception of about 300 feet.

The COURT.—(Q.) What was the original length of that gap?

(Testimony of Ira M. Flocker.)

A. The original length of that gap is about two miles.

Mr. PLATT.—(Q.) Now, Mr. Flocker, I call your attention to a designation upon the map, beginning approximately at the western side of the plat, and shown as "Opening No. 1," "Opening No. 3," "Opening No. 4," "*Opening*," "Opening No. 5," "Opening No. 6 $\frac{1}{4}$ mile," "Opening No. 7," and "Opening No. 8," and will ask you if those designations correctly represent what actually appeared upon the fences at any one of your examinations?

A. They approximately represent what appeared on July 22d, 1911.

Q. As I understand it, then, you discovered these openings upon your third visit in July, 1911, is that true?

A. Yes, sir. With the exception of the one designated as "Opening No. 1," which [18] was an opening about 150 feet wide, where the road from Tuscaroro to Elko entered the inclosure.

Q. Is that road depicted on the plat?

A. Yes, sir.

Q. How is it represented?

A. A dotted line in an approximate position.

Q. Running approximately in an easterly direction? A. Yes, sir.

Q. State whether or not these openings to which I have just called your attention, were in fact in the fences upon your first two visits.

A. No, sir; with the exception of "Opening No. 4," which is a gate, which was a gate at the time of

(Testimony of Ira M. Flocker.)

my first visit, but at the time of my last visit, I believe Mr. Petrie and Mr. Melrose made it a little wider.

Q. Of course, all I care about is positive testimony, and not questions of speculation.

The COURT.—(Q.) At your first visit, as I understand it, there was only one opening, and that was a gate?

A. Oh, no, sir; quite a number of gates.

Q. Let me understand that answer. Were there any openings then in the fence on your first two visits? A. Yes, sir.

Q. Where gates were not used. Were there any openings at those visits when gates were not used?

A. Yes, sir.

Q. Which ones were they, and what were they?

A. There was an opening between what is designated here by—

Q. Just give the number, if it is numbered.

A. It is not numbered. It is just shown "Opening" between a natural barrier, near the top of what is known as Tojam Mountain and a fence which had been constructed by Mr. North, that is, before that time, and also at the southeasterly end of said natural barrier and at this point this symbol shows the land as being very steep. [19] I would not say it was a good barrier; and at this point the natural barrier began again, and ran into section 9—

Mr. LEWERS.—To which we object, if the Court please, on the ground that the bill alleges there was a fence constructed there and the natural barrier there

(Testimony of Ira M. Flocker.)

is confined to a point above that.

Mr. PLATT.—I understood the answer to be in response to a question of the Court concerning certain openings.

Mr. LEWERS.—We desire to apply the rule when they allege an inclosure consisting of an artificial fence; they shall be confined to proof of that; that is all we came here prepared to meet.

Mr. PLATT.—We are not insisting on testimony as to the barriers; it was not in response to our question.

The COURT.—All right; you need not describe it.

Mr. PLATT.—(Q.) As I understand, at the time of your first and second visits all of these openings designated in the red by the word "Opening" and numbers appearing thereafter, namely, *opening*, Opening No. 4, No. 3, No. 1, No. 8, No. 7, No. 6, Opening No., and Opening No. 5, were not discovered by you until your third visit?

A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. And, as I understand it, upon your first two visits, these openings as I have designated them, were not in fact within or upon, or connected with the fences. A. No, sir.

Q. Now, state whether or not there were any gates in this fence discovered by you upon any one of your three visits.

A. At the time of my first visit there was a gate about a quarter of a mile south of the center of section 29 of township 39 north, range 49 east; there was a gate—

(Testimony of Ira M. Flocker.)

Q. Now, what kind of a gate was that?

A. My recollection was that it was nothing but wires, with a post attached, so that [20] the post could be bound to another post on the other side of the road.

Q. When the gate was open, state, as nearly as you can, how big an aperture it made in the fence.

A. Perhaps 30 feet.

Q. Now, were there any other gates?

A. There was a gate about a quarter of a mile west of the center of section 32, township 40 north, range 48 east.

Q. And what kind of a gate was that, if you remember?

A. I think that gate was lying down; I don't think it was closed, it was of wire.

Q. Do you remember how big the aperture was?

A. The aperture was about 30 feet.

Q. Were there any other gates that you discovered?

A. There was a gate at approximately the quarter corner between sections 32 and 33, township 39 north, range 47 east; there was an opening there where a gate had been; that is where the Tuscarora and Gold Circle road emerges.

Q. How wide, if you remember, is that aperture?

A. That aperture is about 150 feet wide.

Q. Are there any other gates?

A. There is a gate—

Mr. LEWERS.—There is no testimony there was any gate there, as I understand it?

(Testimony of Ira M. Flocker.)

Mr. DENMAN.—The testimony was, where there had been.

Mr. PLATT.—Well, it was an inadvertent answer. I asked the witness how wide the aperture was, and the witness testified he didn't think there was a gate, if there was it was down.

WITNESS.—There was no gate at that time.

Mr. DENMAN.—That is, at number one?

Mr. PLATT.—At the point designated as the "Road," as I understand it. A. Yes. [21]

Q. Now, were there any other gates?

A. There was a gate approximately a quarter of a mile east of the quarter corner between sections 7 and 8, township 38 north, range 47 east; that was also a wire gate such as I have described before.

Q. About how wide was the aperture?

A. About 30 feet.

Q. Are there any other gates?

A. There were no other gates at the time of my first visit.

Q. Those, as I understand it, were the gates which you discovered upon your first visit? A. Yes, sir.

Q. Upon your second visit, which as I understand it, was some time in April, 1911? A. Yes, sir.

Q. Did you discover any other gates or any changes in the gates?

A. My examination in April was not very complete; I simply went in there to see if I could discover in a general way, whether changes had been made in the fencing, and I discovered the change referred to before in my testimony, that has been made near the

(Testimony of Ira M. Flocker.)

reservoir on Willow Creek.

Q. That is, you discovered the changes as indicated on the map by the red lines? A. By the red lines.

Q. Closing up the gaps?

A. Almost closing one of the gaps mentioned. The county road had been thrown outside the fence line, down to a point approximately a quarter of a mile north of that corner common to 33, 34, 28 and 27, township 40 north, range 47 east; at a point on the east line of section 28, and near the corner, common corner just referred to, there was an opening about 100 feet wide, where it extended, the new fence line, in toward the stream for perhaps maybe a mile, I would judge.

Q. And upon what visit did you discover that?

A. Upon my second visit.

Q. And that is indicated upon the plat in the red?
[22]

A. I have not indicated it there, no.

Mr. DENMAN.—Just get the red ink, and let us have that on.

Mr. LEWERS.—(Q.) As I understand, there was no gate there? A. There was no gate there.

Q. A lane?

A. At the time of my second visit there was a gate there; at the time of my third visit there was no gate there.

Q. You mean in April there was a gate there?

A. April 10 and 11, my impression is there was a gate there at that time, but in July there was no gate.

Mr. PLATT.—(Q.) Well, designate upon the

(Testimony of Ira M. Flocker.)

map just where that gate was.

A. The point I have just described would be on the northern line between 28 and 27, and at a point a little north of the quarter corner I have described.

Q. And how big an aperture did that gate make?

A. My present impression is that the gate was about 30 feet wide, but that thereafter they widened the opening to about 100 feet, and made the lane.

Q. When did you discover that the opening had been widened? A. July 22d and 23d, 1911.

Q. Upon your third visit? A. Yes, sir.

Q. You may sketch in, if you please, Mr. Flocker, upon the plat, that gate.

Mr. LEWERS.—Before he does that I want to ask a question. (Q.) At the time you made your second visit in April, was that gate across the road, or was it not a gate that led into the field where the reservoir is at the end of the lane in which the public road ran?

A. My impression is that the lane, that the gate was the one which the road went through, running from Midas to Tuscarora; that the fence forming the easterly side of that lane was extended across the stream, and then back on the other side of the reservoir, while the one on the westerly side was just a [23] small short fence.

Mr. DENMAN.—(Q.) Was there an opening from the westerly of that place, a gap in the fence of about 100 feet?

A. That is, the lane itself was about 100 feet wide; it was a short lane which was constructed;

(Testimony of Ira M. Flocker.)

it was about 100 feet wide.

Mr. LEWERS.—(Q.) Is it not a fact that at that time the public road which you have described as going outside of the fence, led through an open lane, and that the gate you refer to, was a gate turning to the side into a field?

A. I don't know what you mean by an open lane; the road was simply outside the fence, along through the sagebrush.

Mr. LEWERS.—Pardon the interruption; I wanted to ask a question before the map was marked.

(Witness marks point on map.)

Mr. PLATT.—I wish you would write upon the plat, so it may be properly designated in the notes, the word "Gate," where you have just indicated it upon the plat.

(Witness marks on plat.)

Q. Now, what have you designated that upon the plat? A. "Gate on April 11, 1911."

Q. Mr. Flocker, have you calculated the entire length and extent of the fence as indicated upon the plat?

A. Yes, but I have forgotten now what it was.

Q. Well, I wish you would make the calculation again, in order that I might ask you the question again. I am doing that for the benefit of the Court; just an approximate estimate, that is all I care for.

A. About 44 miles.

Q. About how many? A. Forty-four miles.

Q. Now, Mr. Flocker, I wish you would estimate

(Testimony of Ira M. Flocker.)

approximately, the linear distance of the fence from a point indicated as the intersection of North's fence with the so-called fence of the [24] Golconda Cattle Company, around to a point indicated upon the plat as "Opening No. 6 $\frac{1}{4}$ mile."

A. About 30 miles.

Q. About 30 miles? A. Yes.

Q. And that estimate was made in response to the question which I just asked you, contemplating that the fence was running in a westerly, southwesterly and easterly direction? A. Yes, sir.

Q. From the point of intersection mentioned in the first question? A. Yes, sir.

Q. Now, at the time of your first and second visits, state whether or not you discovered any openings or apertures in the 30 miles of fence about which you have just testified, except the gates indicated upon the plat with a black line. A. No, sir.

Mr. LEWERS.—(Q.) Do I understand that you mean at that time this was closed? A. No, sir.

Mr. PLATT.—You had better designate what "this" is.

Mr. DENMAN.—Opening No. 1.

A. No, sir, at the time of my first visit, September 10th, there was an opening there at the point mentioned by counsel, where the public road entered the inclosure.

Mr. DENMAN.—One hundred feet?

A. About 100 feet.

Mr. PLATT.—(Q.) Then, as I understand it, the gates indicated upon the plat in the black, together

(Testimony of Ira M. Flocker.)

with the opening indicated upon the map as "Opening No. 1," were the only openings or apertures which you discovered upon your first and second visits? A. Yes.

Q. In the 30 miles of fence about which you have just testified?

A. Not the second visit, because there was a new gate in the newly constructed fence, which was there during my second visit.

Q. Now, upon the second visit you testified that you found a newly constructed fence, beginning westerly of the so-called reservoir [25] and southerly from Willow Creek. Now, I wish you would estimate approximately the length of that new fence indicated upon the plat as I have shown, and represented to be in the red.

A. About 4 miles and a half.

Q. About 4 miles and a half? A. Yes, sir.

Q. Now, Mr. Flocker, I wish you would estimate the combined measurements of the openings in the entire fence, which you discovered upon your second visit, and before your third visit.

Mr. DENMAN.—We object to that. This will be a matter for argument later on, your Honor. We object to that upon the ground this is a proceeding to procure a mandatory injunction to abate a nuisance; that the only thing the Court is concerned with is the present condition of the fence, and what may have transpired in the past has nothing to do with this Court sitting as a Court of equity. The past history, as I take it, has nothing to do with the

(Testimony of Ira M. Flocker.)

fence that the Court is to operate on, and to afford the only relief that it can afford under the bill.

The COURT.—I will allow the question subject to your objection.

Mr. LEWERS.—I desire to add the further objection, at any rate the Court could not go beyond the time when the bill was filed, on May 31st, 1911.

Mr. PLATT.—I submit that these two first visits were testified to as having been made prior to the filing of the bill.

The COURT.—Well, the question will be allowed subject to the objection.

Mr. DENMAN.—We note an exception.

WITNESS.—You wish the approximate total distance of openings?

Mr. PLATT.—Yes, which were there and you discovered upon your second visit. A. Second visit?

Q. Yes.

A. The total, about 5 miles and a half. [26]

Q. It would total about 5 miles and a half?

A. Yes, sir.

Q. Now, that 5 miles and a half is, as I understand it, the aggregate distance of openings in the entire 40 miles of fence, or 40 odd miles of fence?

A. Yes, sir.

Mr. DENMAN.—Thirty.

Mr. PLATT.—No, as I understand his testimony, he testified that the entire length of fence was something over 40 miles. A. 44 miles.

The COURT.—Forty-four miles is what he said.

Mr. PLATT.—(Q.) I will ask you this question,

(Testimony of Ira M. Flocker.)

Mr. Flocker: State the aggregate distance of openings in the fence which you found upon your second visit in that portion of the fence designated on the map, and at a point known as the intersection of North's fence with the Golconda Cattle Company fence, running in a southwesterly and an easterly direction, up to a point designated as "Opening No. 6¼ mile," and representing, I understand from your testimony, about 30 miles of fence.

Mr. DENMAN.—In order that your Honor will see what we will later argue on, we object to this on the ground that the fence last described does not on the face of it constitute an inclosure, therefore the question is incompetent, irrelevant and immaterial; that the bill sets forth an inclosure, and this portion described last by counsel, and referring to the second visit of Mr. Flocker, does not constitute on its face an inclosure.

The COURT.—The question may be answered subject to objection.

Mr. DENMAN.—We note an exception.

Mr. PLATT.—Of course I am not pretending to argue these objections.

The COURT.—No, I don't care to listen to that. Of course I will say very frankly, it seems to me that the only condition I [27] can consider is the condition at the time the suit was brought. If there was no fence there a year before, that is immaterial; if it was all fenced a year before, it is immaterial; but if it was all fenced at the time this suit was brought, it is a very serious consideration, and it is

(Testimony of Ira M. Flocker.)

the only consideration for the Court. But I will allow you to ask these questions, anything that you believe is material, I propose to allow you to go into for the present.

Mr. PLATT.—(Q.) Do you recall the question, Mr. Flocker?

A. Yes, sir. With the exception of two gates about 30 feet in width, there was an opening of about 150 feet, I think. I said 100 feet before, but it is marked 150 feet on the map in red, where the road went through.

The COURT.—Read the question.

(The reporter reads the question.)

The COURT.—(Q.) In those 30 miles of fence there were only three openings, do I understand—two gates?

A. There were two gates, and an opening where the road from Tuscarora to Midas went through, it is about 150 feet wide.

Mr. PLATT.—(Q.) What is the entire distance, or aggregate distance of openings in the fence, in that portion of the fence about which I have just interrogated you?

Mr. DENMAN.—We make the same objection to this question we made to the former one.

The COURT.—It will be the same ruling.

Mr. LEWERS.—We desire an exception.

(The reporter reads the question.)

Mr. DENMAN.—I would like to offer the further objection that the complaint does not claim there was an obstruction, it is simply relying on the inclosure

(Testimony of Ira M. Flocker.)

clause of the statute. [28]

Mr. PLATT.—If the Court please, I do not understand that objection. The question did not refer to any obstruction, as I understand it.

Mr. DENMAN.—Very well, if that is the question.

Mr. PLATT.—The question was directed to the openings—

The COURT.—I will allow the question, and we will wait until the argument ceases. You are showing the facts, if the fence was there, and what openings there are in it, and we will consider these questions later when you argue them.

Mr. PLATT.—My question is only directed—in order that the witness will understand it, and I think counsel will too—is directed to the 30 miles of fence about which you have testified, and I am asking you now the aggregate distance of openings in the 30 miles of fence about which you have testified, and which openings you said were the opening of 150 feet, to permit the road from Midas to Gold Circle, I think it is, to cross the land, or cross the fence, and in addition to that, two gates. What I want is the aggregate distance in feet, of these openings in that 30 miles of fence.

A. It would be over 200 feet.

Q. Well, how much over 200 feet?

A. Well, I think I said the gates were about 30 feet wide.

Q. Then state approximately what the distance would be. A. About 210 feet.

Q. Counsel asks the question as to which point

(Testimony of Ira M. Flocker.)

upon the map that is, and I answer counsel by stating that it is to a point marked upon the plat as "Opening No. 6 $\frac{1}{4}$ mile."

Mr. LEWERS.—Thank you; I understand it.

Mr. PLATT.—(Q.) That, as I understand it, was the condition of the fence, a portion of which you have just testified about, at the time of your second visit in April, 1911, and before your third visit, in July of that year? [29]

A. That was the condition that I found. I may have overlooked a gate, or something, but I didn't find any.

Q. Now, I wish you would state—

The COURT.—Excuse me a moment. You objected to the testimony with reference to the condition of the fence at the time of the second visit, because the issue here is the condition at the time the suit was brought, do I understand?

Mr. LEWERS.—That is correct.

The COURT.—Now, was there another visit which was nearer the date when the suit was commenced than this April visit?

Mr. PLATT.—No, your Honor, the third visit was some time after the suit was instituted.

The COURT.—The third visit was in July, after the suit was brought, and the second visit was in April, before the suit was brought, in May?

Mr. LEWERS.—They are about an equal distance apart; the second visit was in April, and the third visit July 22d.

Mr. PLATT.—The first was September 7th, 8th

(Testimony of Ira M. Flocker.)

and 9th of the year 1910, and the second was in April, 1911, and the third in July, 1911.

Q. What does the blue indicate upon the plat?

A. It indicates patented land.

Mr. DENMAN.—I move to strike out the answer, and object to the question on the ground it calls for the conclusion of the witness.

The COURT.—The question was, what does the blue indicate?

Mr. DENMAN.—Yes.

The COURT.—I will allow the question.

Mr. PLATT.—Of course, I submit I asked him just what it indicates, not what it is, I desire the map explained.

The COURT.—Of course that is a matter subject to proof; you [30] cannot prove title by a map, but what that blue indicates on the map, I think that is very proper to show.

Mr. PLATT.—(Q.) What does the white within the boundaries defined by the fence which you have represented upon the map, indicate?

(Same objection. Same ruling.)

Q. What does the white indicate?

A. It indicates vacant land.

Q. What do you mean by "vacant land"?

A. Vacant and unappropriated public lands of the United States.

Mr. DENMAN.—I move to strike the answer out on the same ground.

The COURT.—I will allow that as an explanation of the map, not as proof of the title.

(Testimony of Ira M. Flocker.)

Mr. PLATT.—(Q.) Now, upon the right-hand margin of the map, Mr. Flocker, in red, and under the caption “Remarks,” you have a written designation, I wish you would explain that.

Mr. DENMAN.—Before it goes into the record I would like to examine it. (After examination.) I object to that on the ground that the red matter shows on its face that it is hearsay evidence as to the time on which certain work was done on the fences. That is correct, is it not, purely hearsay?

WITNESS.—Yes.

Mr. DENMAN.—The whole matter is hearsay.

Mr. PLATT.—Well, if the Court please, I think some of that objection is well taken. I thought the remarks were in the nature of a legend explaining the plat; they do, in part, explain the plat, but with the explanation given orally they are really not essential, and I do not desire to take issue with counsel upon the objection interposed.

Mr. DENMAN.—The understanding is when the map goes in evidence the red matter on the left is deemed to be excluded? [31]

Mr. PLATT.—No objection to that.

Mr. DENMAN.—We ask to mark an excision line, so if the case goes up, the upper court will have no difficulty in determining.

(Marks on map.)

Mr. PLATT.—(Q.) At the southeast corner of the plat you have designated what purports to be a legend, and I wish you would explain that.

A. The straight black line indicates fence line; the

(Testimony of Ira M. Flocker.)

small blue square indicates State land; the small red square indicates right of way filing for reservoir site; the straight line with the little cross line indicates a gate; the two lines drawn free hand with cross intersections, represents natural barrier; a red line indicates new fences constructed after the original report, original examination; the small white square represents vacant Government land; the free hand lines drawn close together represent very steep country; and the dotted line indicates a road; the straight black line with the small lines on one side, that symbol represents gap.

Q. Now, Mr. Flocker, when did you compile the data in order to depict upon the map the vacant Government land thereupon represented, and about which you have just testified?

A. I think it was the latter part of September, 1910.

Q. For the purpose of the map did you make any other or additional investigation, after September 10th, to ascertain whether any of the Government lands depicted upon the map were taken in private ownership?

A. I made an examination day before yesterday.

Q. And from the time that you made your examination in September, 1910, up to and including yesterday, did you find any changes in the ownership of the Government land depicted upon the plat, and about which you have just testified?

A. No, sir. [32]

Q. As I understand it, that part within the so-

(Testimony of Ira M. Flocker.)

called inclosure represented upon the plat in the white, was the condition of the lands in September, 1910, and that that condition remained the same up to and including yesterday of this year?

A. Yes, sir.

Q. Now, at whose request did you make this plat, Mr. Flocker? I ask that question with a view of explaining another delineation, or another explanation upon the plat; I am not particular whether it is made a part of the exhibit or not, but it ought to be explained.

A. This is the plat which I gave Mr. Melrose to send in with his report.

Q. And when did you prepare the plat?

A. July 26th, 1911.

Q. And from what did you prepare the plat?

A. From other data which I had.

Q. Now, Mr. Flocker, upon your first visit to the land about which you have testified, did you in fact make an actual survey, running the lines of the fence, in order to ascertain accurately as to the exact situs and condition of the fences delineated upon your plat? A. No, sir.

Q. State what method you pursued for the purpose of obtaining accurate data to represent upon the plat which is now before the Court.

A. I compiled the map from the Land Office records, the Land Office plats, and I used a survey which had been made by E. C. McClellan for a guide on the southeast corner, and from the Parkinson ranch house and plats, for a check on the west, and I ran

(Testimony of Ira M. Flocker.)

the lines nearly with the compass, here and there taking angles, and I had a small book of profile paper, which I indicated according to the distance secured from counting fence posts, or approximate distance, the fence being practically all on patented land, the two streams, holding the same, I was able to lay down my traverses, and fragmentary traverses, in approximately a proper position. [33]

Q. Then as I understand it, the plat from which you have been testifying, is not an accurate, but an approximately accurate delineation, resulting from the investigation which you made in the manner in which you have testified? A. Yes, sir.

Mr. PLATT.—If the Court please, I desire to offer the plat in evidence.

The COURT.—Any objection?

Mr. DENMAN.—No objection to the plat—well, it may be better again, to suggest our objection, in so far as the plat shows conditions other than at the time the suit was filed, or subsequent thereto, and showing what the Court now has to operate on as a court of equity, it should not be admitted. But our suggestion is, when the Court admits it, it admit it for that purpose.

The COURT.—Of course I shall admit the map, subject to your objections; and, as I understand, all this testimony is to be considered, so far as it throws light on the conditions existing at the time the suit was brought; and evidence which does not tend to show those conditions, of course is irrelevant, and ought not to be in. That is my present view of it.

(Testimony of Ira M. Flocker.)

Mr. DENMAN.—To suggest what we may further bring out, it is our contention that if, *pendente lite*, there be an abatement of an alleged nuisance, that a Court of equity will thereupon refuse to consider the case, on the ground it has nothing to operate on, if it is a case for an abatement; and I maintain there is no allegation of threats to reconstruct, in the bill, or anything of that kind.

The COURT.—That is something I cannot consider now. That is something that will, of course, be taken up later. You do not make that an objection to the admission of this map?

Mr. LEWERS.—We desire that in the form of an objection to [34] save the record; and we ask for an exception to the ruling of the Court, in order to save the record.

Mr. PLATT.—As I stated, I am not attempting to argue objections at this time.

Mr. LEWERS.—We are not making the objection with the expectation that it be argued, but merely for the object of not appearing to pass the point.

The COURT.—If there are any objections you rely on, I expect you to argue them later. If we stop to argue every objection, we would not get through until the middle of the summer.

Mr. DENMAN.—There are two objections I made, to which I did not take an exception to your Honor's ruling, and at this time I would desire an exception.

The COURT.—Very well.

Mr. PLATT.—May this exhibit, if the Court

(Testimony of Ira M. Flocker.)

please, be marked Plaintiff's Exhibit No. 1.

The COURT.—Yes.

(The plat is marked Plaintiff's Exhibit No. 1.)

(Recess until 1:30 P. M.)

AFTERNOON SESSION.

Mr. PLATT.—If the Court please, respective counsel have consented that Mr. Kaufman may be excused from further attendance as a witness before the Court.

The COURT.—Very well, let the order be entered.

[35]

IRA M. FLOCKER, direct examination continued.

Mr. PLATT.—(Q.) Mr. Flocker, what is the general character of the land depicted upon the plat within the so-called inclosure in the white, if you know? A. It is sagebrush grazing land.

Q. Sagebrush grazing land? A. Yes.

Q. Have you made an estimate as to the leasing value per acre per year of that land?

Mr. DENMAN.—Object to that.

Mr. LEWERS.—To which we object on the ground that the testimony sought to be elicited by this question is incompetent, irrelevant and immaterial, in that there is no question of the leasing value, or any other value, involved in the pleadings; that this is an action in equity for a mandatory injunction against an inclosure, and that there is no allegation in the complaint as to damages, and that no damages can be recovered in an action of this kind. We make the further objection that the testi-

(Testimony of Ira M. Flocker.)

mony should not be received, because no foundation has been laid authorizing inquiry into any such matter, even if it were pleaded in the complaint, in that the Government has not shown that they are entitled to the equitable relief prayed for in the bill.

Mr. PLATT.—If the Court please, as to the question of equitable relief, we have a general prayer in the complaint, asking for general, equitable relief. There is also a prayer in the complaint calling for an accounting on the part of the defendant for the use of this land.

The COURT.—I will allow you to introduce this testimony; subject to the objection, though.

Mr. DENMAN.—May I inquire—one moment, Mr. Platt; do you contend under the interlocutory order for an accounting this testimony [36] is relevant?

Mr. PLATT.—Under the averment for an accounting, and under the general prayer for equitable relief in actions of this character, in my judgment the testimony is relevant.

Mr. DENMAN.—There is no *ad damnum clause*, no claim for damage done. There is a claim for an accounting, but you cannot get an accounting on a trespass; and we add that as an objection.

Mr. PLATT.—I am ready to submit authorities on that point.

The COURT.—I am making this order as I do, because I want to get through. I am in a hurry, and whatever testimony you offer in good faith, I am going to allow it in, subject to the objection.

Mr. LEWERS.—I make this suggestion: I antic-

(Testimony of Ira M. Flocker.)

ipate, in the light of what your Honor suggests, in disposing of this rapidly there will undoubtedly, from indications, be considerable testimony along this line; now if our position is correct, and under the authorities we are very confident of our position, under the decisions of the Supreme Court of the United States, why such testimony cannot be properly entertained at all, and its exclusion will save a great deal of time.

The COURT.—How much testimony is there of that kind?

Mr. PLATT.—There is very little, if the Court please.

Mr. DENMAN.—It throws it on us; we have got to go in and meet it on the other side.

The COURT.—Well, I think I will go on to-day, for the present, and you can submit your authorities on that point any time during the day.

Mr. LEWERS.—We desire to be heard, and under that condition we probably had better present that at some later time when your Honor can give us the opportunity. In the meantime, we desire to be allowed an exception upon all the grounds stated.
[37]

Mr. PLATT.—Will you read the question?

(The reporter reads the question.)

Mr. LEWERS.—We desire to add another objection: There has been no foundation laid as to the qualification of this witness; and, in addition, nothing shown as to his knowledge of the reasonable leasing value of property in that community, and this

(Testimony of Ira M. Flocker.)

would be merely speculative and dangerous guessing. The witness has been there three times.

Mr. PLATT.—I think that is a good objection, in the absence of a foundation that he has accurate knowledge, and upon that objection, if the Court please, I withdraw the question.

Q. Now, Mr. Flocker, in your experience since you have been in the employ of the Interior Department, how many unlawful inclosure cases have you examined?

Mr. DENMAN.—I object to that on the ground it is irrelevant, immaterial and incompetent.

The COURT.—It will only be admitted on his competency to answer the question.

A. I can only approximate the answer.

Mr. PLATT.—Give me an approximate estimate.

Mr. DENMAN.—Same objection. I suppose the same ruling, your Honor?

The COURT.—The same ruling.

Mr. DENMAN.—We note an exception.

A. Perhaps 25 or 30.

Mr. PLATT.—(Q.) How many of those were examined within the District of Nevada, approximately? A. About half.

Q. In addition to these enclosures to which you testify, did you in addition to that, examine the character and nature of the lands alleged to have been inclosed? A. Only in a general way. [38]

Q. Did you ever examine them with a view of ascertaining their character, and ascertaining the approximate valuation for their use? A. No, sir.

(Testimony of Ira M. Flocker.)

Q. Then, as a matter of fact, you have not had sufficiently intimate knowledge with the character of the lands, and these particular lands, so as to testify as to their possible leasing value.

A. Well, I don't think I have.

Mr. PLATT.—That is all.

Mr. DENMAN.—Is that all you have to ask of the witness?

Mr. PLATT.—That is all.

Cross-examination.

Mr. DENMAN.—(Q.) In the northeast corner of this map there appears a legend or insignia, called "Toejam Mountain," and I see by the legend underneath, that that is described as a natural barrier—by the way, have you read the complaint in this case?

A. I have looked over portions of it, I don't know as I have read it all.

Q. Read descriptions of the fence and of the inclosure? A. Yes.

Q. You helped the District Attorney prepare that complaint, did you not?

Mr. PLATT.—I object on the ground it is improper cross-examination, incompetent, irrelevant and immaterial, whether he saw the complaint or whether he did not.

The COURT.—Well, I don't think it is; but it will not make a particle of difference with the decision in this case, absolutely none, whether he drew that complaint, or whether he did not. If it should appear here that he drafted that complaint and did all the work, except appearing here in court, it would [39]

(Testimony of Ira M. Flocker.)

not make a particle of difference.

Mr. DENMAN.—I understand that. It is leading up to an entirely different thing. I want to show in drawing the complaint, he made the complaint inconsistent with the statement he has made here on the stand, and inconsistent with this map.

The COURT.—Then his attention should be called to the complaint, and the signature on the bottom of it, to show that his statements do not agree, if that is the purpose of it.

Mr. LEWIS.—He might be bound by having made the statements in the complaint, if the Court please, and yet his signature not appear on it.

Mr. DENMAN.—If he said to the District Attorney—

The COURT.—Well, go on, I will not shut you off.

Mr. DENMAN.—If he had said to the District Attorney, your description is correct, you have in your complaint a proper description of that natural barrier, and of the fences connecting up with it; if he had said that to the District Attorney, and now says something else in his map, this inconsistent statement is admissible for the purpose of showing at another time he made another and different statement.

The COURT.—On cross-examination you want to prove a conversation, not in direct testimony, with the District Attorney, and then you want to take the complaint, and show they do not agree, in order to show his testimony is not reliable?

Mr. DENMAN.—To show on this particular portion of his testimony he has made contradictory state-

(Testimony of Ira M. Flocker.)

ments; that is, on the testimony given in direct examination.

The COURT.—I think it is going to take a good deal too much time. All I want here are the facts, and I tell you very frankly, it seems to me, gentlemen, there are a good many facts here you ought to stipulate. [40]

Mr. LEWIS.—There are many we are willing to.

The COURT.—I think *there* a lot of facts you could stipulate and save a great deal of time. All I want to know are just what the facts are, and from the character of the witnesses you have here, there is not going to be such a great deal gained by long cross-examinations, or long direct examinations. I know a good many of these men, and it seems to me you ought to shorten this trial a great deal by admitting those facts about which there cannot be any dispute.

Mr. LEWERS.—We are willing to do that, if the Court please.

Mr. DENMAN.—Not only willing, but I offered to the District Attorney to sit down with him at any time he would designate, and prepare an agreed statement of facts for the Court, and he declined to do so. I made that offer on two occasions.

The COURT.—All I can do is to suggest.

Mr. LEWERS.—There is a great deal more in connection with the particular branch of the examination now entered into by Mr. Denman than appears upon the face of it, and we are entitled to get at the exact facts; and we are entitled as a part of the cross-examination to show, if we can, that prior contradic-

(Testimony of Ira M. Flocker.)

tory statements have been made, for the purpose of testing the accuracy of the report made by the witness.

The COURT.—Very well, you will have to proceed in the regular method, as to whether on a certain occasion, he, in the presence of certain parties, did not make a certain statement.

Mr. DENMAN.—(Q.) Mr. Flocker, referring again to the design under the name of Toejam Mountain, that is marked as a natural barrier?

A. Yes, sir.

Q. Do you claim that there is a natural barrier extending from the fence here—

A. (Intg.) There is no fence there.

Q. Pardon me, there is. [41]

A. With that new fence.

Q. I am referring now to the red line which is to the direct south of this Toejam Mountain natural barrier, and which adjoins it at the bottom of the vertical center line of section 34. Now, is it your contention that there is a natural barrier extending from that red, ending at the point I have indicated, to the fence, which is marked "North's Fence," lying to the westerly of the barrier?

A. No, sir, not all the way.

Q. How much of the way would you say there was a barrier extending across there?

A. Well, most of the way. There is a space between the barrier and the fence, and it might be possible at one or two places to get over the barrier, between that and the other fence mentioned.

(Testimony of Ira M. Flocker.)

Q. Describe that barrier.

A. It is an outcrop of rim-rock, it is not very high in places, and not very good as a barrier.

Q. Is it not true there is half a mile of territory there that cattle can graze over?

A. Perhaps half a mile.

Mr. PLATT.—I submit that question is objectionable, because it calls for an opinion of the witness as to whether cattle may graze over it or not. I think your Honor may determine that from the facts.

The COURT.—I will allow that question.

Mr. DENMAN.—(Q.) Now, as a matter of fact, is it not true there is a mile of space there?

A. Not in my opinion.

Q. Are you a cattle man? A. No, sir.

Q. Now, as to the fence at the place under the word "Creek," in section 28 of township 39 north, range 48 east, you remember you had some doubt on direct examination as to whether or not there was a gate there when you made your examination in the month of April, 1911. Now, as a matter of fact, when you made that examination, was there not an opening through which this road ran, but [42] a gate on the left of it turning into the field?

A. Well, that may be true, I am uncertain. My impression is that there was a gate there.

The COURT.—Will you explain that question, Mr. Denman? I do not understand just what you mean.

Mr. DENMAN.—The road running from Midas through the opening here, across the Government land and the State land up here, came out here

(Testimony of Ira M. Flocker.)

through an opening; there is no gate on the road, but there was a gate at the immediate left, entering into a field on this side.

Mr. LEWERS.—I can illustrate so the Court can understand. Something like that (drawing on black-board); this representing the road (indicating), and that representing the gate; the question is whether that was the condition; the gate turning into this reservoir field.

The COURT.—Is there more than one field?

Mr. LEWERS.—Well, the map does not show it. It is shown that there is more than one.

The COURT.—Is this road you have made there, is that the road you just pointed out from Midas to Tuscarora?

Mr. LEWERS.—That is a road that leads out here at opening No. 1, that goes right through the alleged inclosure.

Mr. DENMAN.—Here is Midas about here, here is the town of Dutton (indicating), and right about in here the road runs through across up Willow Creek, inside the alleged fence, crosses the red line fence here through a lane, an open lane, and goes along on the outside of the fence thereafter.

The COURT.—Is that road fenced?

Mr. LEWERS.—No, there is no contention there is any fence on that road. [43]

Mr. DENMAN.—The road is open at both ends; the road runs right through.

The COURT.—But there is a lane through which they enter the main field?

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—Yes.

Mr. DENMAN.—The road runs through a lane, and that lane has fields on both sides of it, which are in private ownership; and the road runs down on State land through here, and then crosses the Government land here (indicating on plat), and comes out here, all open and unfenced, but at this point there is an open lane where it passes through a fence.

Mr. PLATT.—Of course, if the Court please, I take issue with the statement.

Mr. DENMAN.—I mean this is our contention.

Mr. PLATT.—I take issue with the statement that this road is open and unfenced, because the plat shows it is fenced.

The COURT.—What I was asking was whether the road was a lane.

Mr. LEWERS.—It is a lane for a quarter of a mile, is our contention.

Mr. DENMAN.—I think it is less than that.

Mr. LEWERS.—Less than that, yes.

Mr. DENMAN.—(Q.) Now, coming to your trip in April of 1911, where did you start from on that trip? A. Trip in April?

Q. Yes. A. Started from Midas.

Q. When did you arrive there?

A. When did I arrive in Midas?

Q. Yes.

A. I think it was the evening of the 9th of April.

Q. Where did you go, where did you stay?

A. I stayed at two different places, I am a little uncertain as to which one I stayed at this time, but I

(Testimony of Ira M. Flocker.)

think it was some little rooming-house they had.
[44]

Q. You arrived that night, did you? A. Yes.

Q. Started out the next morning on the trip?

A. Yes, sir.

Q. And where did you go first, or what did you take? How did you go, horseback or a-foot?

A. In a buggy.

Q. Who was with you in the buggy?

A. Mr. Backus.

Q. Where did you drive to first?

A. We drove down to opening No. 1, and entered the inclosure there, finding that new fence which is marked in red; and I took angles on the fence line, so I will be able to run it in there between the control lines, also went around to the gate on the other side, and located the gate on the inside fence.

Q. Yes. Where did you go then?

A. I may be mistaken about that being the first day; I think the first day, I could not tell without the daily reports; I think that was the second day. The first day we went out along—

Q. Where did you go to when you left Midas the first day?

A. The first day we came down to this opening, and then we went back and went up the road—gate No. 1—and then went up the road to what is called the Pitch Fork Ranch house on Fraser Creek, then up along the fence, up about this far (indicating).

Mr. LEWERS.—Where is “this far”?

Mr. PLATT.—Just designate that point.

(Testimony of Ira M. Flocker.)

A. Somewhere about the center of section 33 of township 40 north, range 48 east.

Mr. DENMAN.—(Q.) That is, you rode that distance? A. No, sir, not all the distance.

Q. Well, you rode some of the distance?

A. Well, a road has been made by hauling around the fence in a great many places.

Q. How far from the fence is that road?

A. The road runs right along the fence most of the distance. [45]

Q. Most of the whole distance?

A. Yes, sir, with the exception of down here.

Mr. PLATT.—When you say “down here” the reporter don’t know what you mean.

A. At Opening No. 1.

Mr. DENMAN.—(Q.) You did not say in your direct examination that you rode that fence carefully from Opening No. 1 to Opening No. 4.

Mr. PLATT.—The witness misunderstands the question, and counsel misunderstands the witness. The witness is referring to a road, and counsel is referring to riding along the fence.

Mr. DENMAN.—Do you understand the question now?

A. I think so. My examination in April, I merely went near enough in places in order to be reasonably certain that there had been no changes made in the fence line.

Q. You mean the general line of the fence?

A. Yes.

Q. You were not near enough to see the openings

(Testimony of Ira M. Flocker.)

along that line of fence in April?

A. Along a great portion of them.

Q. Now, as a matter of fact, is it not fair to say, you could not swear to over a quarter of that length, as to whether there had been additional openings put in or not? That is correct, is it not?

A. Well, I would not limit it to a quarter of the length.

Q. Well, 30 per cent?

A. Well, of course, I would have to inspect the map more closely to give a definite answer.

Q. You know what you did on that first day where you went around there?

A. You mean during the first day only in your question?

Q. I mean during the first day, yes.

Mr. LEWERS.—You mean September 10th?

Mr. DENMAN.—No, this is in April, 1911.

Mr. PLATT.—He does not pretend to testify that he examined all the fence during the first day. [46]

Mr. DENMAN.—That is what I want to bring out, what he did the first day and the day after.

A. As I say, I went only up about as far as section 33 from the Pitch Fork Ranch house, or about from the Pitch Fork Ranch house, was practically along the fence all the way.

The COURT.—(Q.) Cannot you say about what portion of that fence you examined with care on that occasion, so that you could testify positively as to what openings were there, and what were not?

A. I examined that portion about the Pitch Fork

(Testimony of Ira M. Flocker.)

Ranch house on Fraser Creek.

Mr. DENMAN.—(Q.) That is on Opening No. 3?

A. Yes.

Q. From there up to Opening No. 4?

A. Beyond that up to the middle of section 33, township 40 north, range 48 east.

Q. As a matter of fact, you didn't examine this portion here at all, did you, between Opening No. 1 and Opening No. 3?

A. No, sir, I didn't go along the fence there.

Q. I thought so. Now, when you were there in the month of September, 1910, don't you recollect the opening you found in section 35 in township 40 north, range 48 east, about 200 feet, four post holes?

A. I don't remember that opening.

Q. It might have been there and might not?

A. I don't remember it.

Q. Well, you said this morning there might have been an opening or two that you failed to put on?

A. Yes, sir.

Q. As I understand it, this fence which runs from section 9, township 40 north, range 49 east, running through 8, 5, 4, 33 and 40, in that township and range, then entering into 33, and passing through 33 and 34 of the Toejam Mountain, as I understand that was not there when you were there in April?

A. No, sir.

Q. That was built some time before your trip there in July? [47]

A. I will not testify positively on that point, because I didn't go up further the next day than to

(Testimony of Ira M. Flocker.)

determine whether or not this next gap existed, so I could not see that fence up there, but I was informed later—

Q. It don't matter what you were informed; I simply want to know what you know yourself. You did not see that until July, 1911? A. No, sir.

Q. Do you know whose fence that is?

A. I was informed by Mr. Petrie.

Q. You don't know of your own knowledge?

A. No, sir.

Q. What is the nature of this so-called barrier; that is to say, the barrier in section 4, township 39 north, range 49 east?

A. The country in here is—

Q. I am talking about this barrier, marked as a "Barrier." A. Yes.

Q. What is that?

A. That is a barrier of rock from which the soil has been washed away by the stream swinging against the side of a rocky knob in here.

Q. Do you contend that barrier extending through easterly is impassable to grazing cattle?

A. That barrier?

Q. Yes.

A. Perhaps not absolutely impassable.

Q. I am talking about this barrier in section 4.

A. Perhaps not absolutely impassable, no.

Q. Could cows and calves graze over there or not, in your opinion?

A. They could go through, but I say the tendency would be for them not to go through.

(Testimony of Ira M. Flocker.)

Q. How about a wagon driving through?

A. I never drove down over it.

Q. I am not asking you that; I am asking about the possibility of a wagon driving over it?

A. I don't think it is possible.

Q. How about driving a wagon over here, on this Toejam Mountain? [48]

A. I don't think it is possible.

Q. Is it not true there is three-quarters of a mile of territory in which wagons can be driven right through there to Tuscarora?

A. I don't think so.

Q. Did you ever go on that mountain?

A. No, sir, I never was up on top of it, merely saw the barriers from down in here.

Q. Didn't you, as a matter of fact, drive over this barrier with Mr. Petrie in July?

A. No, sir, Mr. Petrie came down this way, inside of the fence.

Q. You don't contend this is a barrier here, do you?

A. I contend that is a very steep country; it is not a barrier.

Q. What do you mean by "steep country"? As a matter of fact, the richest feed is in the steep country, is it not. That is so, that is a fact, is it not?

Mr. PLATT.—If we are going to get opinions of witnesses, I have plenty of witnesses to express opinions, if that kind of testimony is going to be permitted.

The COURT.—I would like to hear him tell just

(Testimony of Ira M. Flocker.)

what the facts are, just what that is, so I can have some idea.

Mr. PLATT.—I have no objection to his testifying as to the nature of the barrier, but the question of expressing opinions. I did not ask his opinion as to the value of the lands when he showed he was not qualified to testify.

Mr. DENMAN.—(Q.) Let me ask you this: Is it not a matter of fact, you found that was rich in feed?

A. Well, I would say, as I remember it, there was more feed there than down in the inclosure.

Q. Is it not also a matter of fact that these drift fences are for the purpose of turning cattle up in the mountain territory there?

A. I don't know.

Mr. PLATT.—I object to that, because he is asked if the purpose [49] of a drift fence was so and so.

Mr. DENMAN.—A man can tell much better who has seen the country, and has seen the feed, as to what the apparent purpose of these alleged obstructions may be.

The COURT.—I should think the witness could tell enough about those barriers, so that the Court could decide for itself whether they would turn cattle or not, and tell how steep they are, and how high they are, and how rugged they are, and whether covered with timber, or what the nature of the country is.

Mr. DENMAN.—(Q.) You were never in the Toejam Mountains?

A. I never was up to the barrier, up to the rock outcrop.

(Testimony of Ira M. Flocker.)

Q. Do you know whether there is any rock outcrop? A. I could see it.

Q. How far were you from it? I am talking about the time you went with Mr. Gray?

A. Mr. Gray and I walked across, about in that position (indicating on plat), a distance of perhaps about a mile or more.

Q. From the barrier?

A. There was a valley between where we were and the outcrop.

Q. Then the next time you went there, you didn't go as near, the next time, did you?

A. No, sir, I didn't go up to look at it at all, I could see from where I was.

Q. Now, when you went there in July, you didn't go over to the barrier, did you?

A. Not all the way.

Q. Not all the way, you didn't go beyond North's fence, did you?

A. Mr. Melrose and I went up the same ridge that Mr. Gray and I had gone up.

Q. This valley you saw, where did that go to?

A. That valley went into this stream down here, called Jenkins Creek, I think on the map. [50]

Q. And where did it go in the other direction?

A. There is a low divide in here between that and the drainage this way.

Q. Is there any brush in that country?

A. A growth of trees and brush along the stream.

Q. How thick is that brush, would it turn cattle?

A. No, sir, I don't think it would turn cattle; I

(Testimony of Ira M. Flocker.)

saw cattle there.

Q. You saw cattle feeding all through here, didn't you? A. Not on the other side of the mountain.

Q. I am aware of that, but presume it is not so much of a mountain, you saw the cattle feeding right up the side when you were there with Gray, didn't you? A. I don't remember any.

Q. Might have been there and might not?

A. There may have been, if there were, they were low down, I know there were not any very far up.

Q. Did you follow any of the cattle trails in there to see where they went? A. No.

Q. You don't know anything about the condition of the cattle trails there? A. No, sir.

Mr. DENMAN.—That is all. Take the witness.

Mr. PLATT.—That is all.

The COURT.—Just a moment. (Q.) When you were there on your second visit in April, 1911, how many openings were there in the entire enclosure?

A. Well, I saw only four on the April trip.

Q. On the April trip?

A. Oh, on the April trip, refencing had only been constructed up this far, this portion was not there; there was an opening between that and the old fence.

Mr. DENMAN.—Pardon me, I want this in the record. (Q.) As I understand, when you were there in April there was no fence between [51] the point marked 31, that is, the middle of section 31 in township 39 north, range 49 east, and a point marked 29, under the words "Siawappe Corral"?

Mr. PLATT.—The map does not so indicate.

(Testimony of Ira M. Flocker.)

Mr. DENMAN.—Pardon me, just let me have the witness.

A. The old fence line was standing; the new fence line had not been constructed.

Q. You allege—now be careful about this—in the month of April when you were there, that the old fence line was standing between the middle of the westerly line of section 32 in township 39 north, range 49 east, and the point marked 29 under the words “Siawappe Corral”; do you mean to say there was standing a fence in the month of April, 1911 there, that it was not down?

A. Yes, sir; it was extending down to the Tuscarora road, at the point—

Q. In section 32? A. Yes.

Q. Then there was an opening there then of about a half a mile? A. Yes, sir.

Q. Are not you mistaken as to that; were not the posts standing there, and the wires off?

A. I will state positively the old fencing was there, standing there.

Q. Wires and all? A. Yes.

Q. You swear to that positively? A. Yes, sir.

Q. An opening of about a half a mile, you say?

A. Yes.

The COURT.—(Q.) Where was the next opening of the four?

A. In the month of April I discovered that the opening or gap shown in my original report, beginning at section 20, township 39 north, range 49 east, extending up to Nelson’s fence, was unfenced.

(Testimony of Ira M. Flocker.)

Q. That was the second opening; how long was that opening?

A. That was about two miles. [52]

Q. That is the second one; now the third one.

Mr. PLATT.—Let me understand that, with your Honor's permission. The fence indicated in the red, beginning in section 20, township 39 north, range 49 east, and running up to a point indicated by an arrow from opening No. blank, state whether or not in April that fence indicated by the red was up or down?

A. It was down. It was not constructed until after April.

Q. It was constructed in July?

A. As near as I know.

Q. Then this gap about which you testified, was a gap when you visited the land the second time?

A. Yes, sir.

Mr. DENMAN.—(Q.) There is only two; now the third gap.

A. Well, the condition up there I am unable to testify to on the April examination, because I didn't go up there.

Q. Then for all you know—the condition here you cannot testify to—but for all you know the condition was the same as when you went through there in September?

A. Yes, sir, I have reasons to believe it was the same.

The COURT.—(Q.) Now, where was the fourth?

A. Well, the gate was there, as shown in the

(Testimony of Ira M. Flocker.)

original report; the opening down here at the road, 150 feet wide; a new gate had been constructed in the inside fence.

Q. You told me there were four openings, you have given six.

Mr. PLATT.—I think he did not mean the gates.

The COURT.—I just want to understand. (Q.) I will ask you next how many of those openings had gates. Now, just give me to start with the number of openings, those where there were gates, and those where there were no gates. A. In April?

Q. At the time of your second visit, that is the last visit you made prior to the commencement of the suit.

A. As I testified, my impression is that there was a gate opening— [53]

Q. Well, just count the number of openings, and give us that number, then the explanation can come afterwards.

A. Five; however, I did not go around this portion (indicating).

Q. Well, would you count that six?

A. I assume that the conditions there were the same as when my original report was made.

Q. Well, count that 6, then. At how many of those were gates fixed?

A. I missed one. One right here (indicating).

Mr. PLATT.—That makes 7.

The COURT.—Well, 7 openings. Now, how many of them had gates?

A. Three.

(Testimony of Ira M. Flocker.)

Q. Three gates. Now, how wide were those gates?

A. Thirty feet wide, I should say.

Q. Now, the first opening you gave a while ago was half a mile? A. Yes, sir.

Q. And the next opening—

Mr. DENMAN.—That is the opening at number 6?

The COURT.—Yes. And the next opening was about two miles? A. Yes, sir.

Q. Now, that two-mile opening is south of the Toejam Mountain? A. Yes.

Q. Now, the third opening, where is that?

Mr. DENMAN.—At the Toejam Mountain?

A. If you are counting all this as one opening, the third would be up there, but I didn't see that in April.

The COURT.—(Q.) You didn't go there. Now, where is the next one that you did see?

A. A gate? The next one is down here (indicates).

Q. How wide was that? A. 150 feet.

Mr. PLATT.—That is the Opening No. 1, as indicated on your plat in the red? A. Yes, sir. [54]

Mr. PLATT.—And that is all, is it? Did you find any others? A. No, sir.

Mr. DENMAN.—One moment. As a matter of fact, you didn't traverse the territory from here to here on that April trip, that is, from opening, or about 33, in township 40 north, range 48 east, you didn't traverse the fence at all, around to about 20, in township 39 north, range 49 east?

(Testimony of Ira M. Flocker.)

A. No, sir.

Q. In the month of April? A. No, sir.

The COURT.—(Q.) What sort of a fence was it?

A. Post and wire.

Q. How many wires?

A. I think three, some places there might have been four.

Q. Now, what sort of mountains are the Toejam Mountains, what sort of an elevation is it?

A. Well, it is—I have never been in this country back in here, but I should judge it was spur from the high mountains between Tuscarora and Squaw Valley.

Q. What is the elevation above the surrounding country?

A. Perhaps 1,500 feet; that is only a guess, however.

Q. Are the slopes covered with grass?

A. Well, there is grass there.

Q. All the way up?

A. As far as I could see.

Q. Did you go up there at all?

A. Up on top of the mountain?

Q. Yes. A. No, sir.

Q. Could you go up?

A. Yes, sir, I think so.

Q. Could you ride down horseback?

A. I think so.

Q. How about this barrier down below?

A. This barrier (indicating)?

Q. Yes.

(Testimony of Ira M. Flocker.)

A. Well, that barrier, as I said, along near the stream, beside a rocky hill, by the side of a rocky hill, I should say it was a good barrier. My opinion is formed from other cases I have examined. [55]

Mr. LEWERS.—I move that be stricken out. We have no knowledge what was in those other cases.

The COURT.—(Q.) Could you ride over it horse-back?

A. I should say no, not this barrier.

Q. Would cattle go through there if they were driven, do you know?

A. I don't think they would go through there because they could be driven down there or there (indicating).

Q. Well, they could be driven over the barrier?

A. I don't think so.

Q. Could they be driven over Toejam Mountain?

A. Yes, I think they could in places.

The COURT.—That is all.

Mr. PLATT.—Call Mr. Robinson.

(Mr. Robinson takes the witness-stand.)

Mr. LEWERS.—Now, if this is a question of proving something on the map, I think we can save a lot of time as to the ownership.

Mr. PLATT.—I am agreeable to a stipulation, if we can stipulate. I desire to prove by Mr. Robinson that he is an official of the United States Land Office at Carson City; that he has examined the plats in the United States Land Office in connection with the plat as introduced in evidence, and that all of the land within the so-called inclosure is open, unappro-

(Testimony of Ira M. Flocker.)

priated Government land, and is so shown upon the tract books and plats in the United States Land Office; and that the lands indicated in the blue upon the plat are in private ownership.

Mr. DENMAN.—Which would indicate, Mr. Platt, that the fence was on private land, so far as you know?

Mr. PLATT.—So far as I know, we are willing to admit that, that is, with some few exceptions. I think there are one or two [56] places possibly, that that fence does not run on private land, as indicated by the plat, but in the main, that is so. I think in the main that is so, if the Court please, but the plat will speak for itself to that effect. It is immaterial whether it is all on private land or not, so far as the theory of the Government's case is concerned.

Mr. DENMAN.—We are willing to make that concession then, if that is the Government's theory.

Mr. LEWERS.—There is no need of going into the theory of proving all that represented in white being Government land. We will concede that for the purposes of the record.

The COURT.—Then is it conceded that the land marked in blue is in private ownership?

Mr. DENMAN.—Yes.

Mr. LEWERS.—We do not concede it is all ours, because it is not all ours.

The COURT.—That is as far as the concession goes?

Mr. DENMAN.—Yes.

Mr. LEWERS.—We are willing to concede fur-

(Testimony of Ira M. Flocker.)

ther, we don't claim that land in the interior, and never have.

Mr. PLATT.—Well, if the Court please, it is the contention of the Government that they have asserted a claim of right to it by virtue of having inclosed it.

Mr. DENMAN.—Well the statute provides that—

The COURT.—You don't lose anything by not arguing those statements, because I am not going to make up my mind about anything at present.

Mr. DENMAN.—I was going to state our concession. We concede that the Government owned that white land in there, that we did not claim any right to it; that we had no color of title to it. That is the situation. [57]

Mr. PLATT.—I think that is all with Mr. Robinson, if that may be admitted. Now, if the Court please, we can save a great deal more time if counsel may stipulate that the fence as indicated upon this plat introduced as Plaintiff's Exhibit No. 1, with the exception of such fence as is indicated upon the plat as being fence belonging to other parties or people, was a fence constructed and maintained by the defendant in this case, the Golconda Cattle Company.

Mr. DENMAN.—We won't concede that, because in the first place you have not shown all the openings. We cannot concede that.

Mr. PLATT.—If the Court please, I am trying to get stipulations if I can.

The COURT.—Well, I appreciate the effort that is made, and when you can agree, it is all right, and when you cannot agree you would be wrong to do so.

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—If the map was a little different we could very quickly agree. In that connection, Mr. Platt, I will ask you whether you will agree that there is no fence leading from section 8 in township 40 north, range 49 east, into section 5, 4, and over into section 3, to the beginning of the barrier, which you have denominated on this plat as Toejam Mountain?

Mr. PLATT.—No if the Court please, I won't agree to that, because all of the testimony relevant to this plat is in, and I don't propose to stipulate to anything that is already in evidence. Now, Mr. Flocker, has testified concerning this plat, and concerning the fences as indicated upon the plat and that is a matter of testimony.

Mr. LEWERS.—I was merely inquiring as to whether you expected to prove the allegations of your complaint.

Mr. PLATT.—I am not trying this case to prove the allegations [58] of some other complaint.

The COURT.—Call the next witness.

Mr. PLATT.—Call Mr. Osborne. [59]

[Testimony of Drury P. Osborne, for the Plaintiff.]

DRURY P. OSBORNE, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name, Mr. Osborne.

A. How is that?

Q. What is your full name?

A. Drury P. Osborne. You will have to talk a little louder to me; I am a little deaf.

(Testimony of Drury P. Osborne.)

Q. Where do you live?

A. I live in Biggs, California.

Q. Were you ever employed for the Golconda Cattle Company? A. Yes, sir.

Q. You were subpoenaed as a witness to testify upon the part of the Government, were you not, in this case? A. Yes, sir.

Q. Did you come to my office on yesterday in response to my request? A. Yes, sir.

Q. Did you inform me on yesterday that you would not discuss this case with me privately in my office?

A. Yes, sir.

Mr. LEWERS.—We object to that line of interrogation on the ground that it is an attempt to impeach their own witness.

Mr. PLATT.—That is it exactly. I am attempting to show that he is a combative witness for the Government.

Mr. DENMAN.—He has not shown it on the stand yet.

Mr. PLATT.—Well, I am attempting to show it.

The COURT.—Go on and ask the questions.

Mr. LEWERS.—The witness has the privilege to talk, or not to talk.

WITNESS.—I told you I would talk when I came before the Judge.

Mr. PLATT.—(Q.) You told me you would talk when you came before the Judge, and you refused to discuss the case with me in my office, before you were called as a witness, is that true? A. Yes, sir.

(Testimony of Drury P. Osborne.)

Q. Had you had any conversations with your attorneys, or with the attorneys for the defendant company, concerning this case after you were subpoenaed as a witness on behalf of the Government?

A. Why, I might have had some, yes.

Q. Where did you have those conversations?

A. Well, I talked to Mr. Lewers in Reno.

Q. And were those conversations with relation to the issues involved in this case?

A. Well, yes, to a certain extent.

Q. Did they know at that time, or did you tell them that you were a witness subpoenaed on behalf of the Government? A. Yes, sir.

Mr. LEWERS.—Now, if the Court please—

Mr. PLATT.—Now, Mr. Osborne—

Mr. LEWERS.—Just a moment.

Mr. PLATT.—I don't know whether there is a motion to strike out or not.

Mr. LEWERS.—No, there is no motion to strike out. Mr. Platt may not know it, but this witness was brought from California here by my order, and at our expense, and at our request, and I do not like the insinuation there was anything improper about my speaking to the witness. He was our witness long before he was subpoenaed by the Government. We brought him over, and took him over the ground, part of it, and took him up to Golconda.

Mr. PLATT.—(Q.) Were you ever employed by the Golconda Cattle Company?

A. I told you yes, I was.

Q. In what capacity?

(Testimony of Drury P. Osborne.)

A. I have filled every position, I guess, from brick-layer up to superintendent.

Q. When were you employed as bricklayer for the Golconda Cattle Company?

A. 1907, that I was laying rock up at the dam.
[61]

Q. State how long you continued in the employ of the defendant company, and what the respective natures of the employment were.

A. Well, I worked on the dam until some time in November; then I built the telephone proposition to Golconda, and from that I went back to Squaw Valley as foreman under Mr. Sibbles.

Q. Who was Mr. Sibbles?

A. He was supposed to be the manager of the Golconda Cattle Company at that time.

Q. And you were foreman under him as manager?

A. Well, he was manager, I was foreman.

Q. I say you were foreman under him as manager?

A. As my being manager?

Q. Mr. Sibbles was manager, and you were his foreman, is that true?

A. Yes, sir, that is true.

Q. How long were you foreman of the Golconda Cattle Company?

A. Something over three years, I guess, altogether.

Q. What were your general duties as foreman?

A. Well, it was to see that the work went on according to orders, I guess.

Q. That is, the general work of the Golconda Cattle Company?

(Testimony of Drury P. Osborne.)

A. First, I had the Squaw Valley country; of course I didn't have nothing to do with the river or the cattle or the sheep; I had the Squaw Valley country.

Q. I will ask you to examine the plat upon the blackboard, and testify whether or not it correctly represents the territory or the holding known as the Squaw Valley Ranch, over which you exercised your foremanship?

A. No, there is very little of the Squaw Valley Ranch there.

Q. When have you ever seen that map?

A. This map here?

Q. Yes. A. I saw it put here this morning.

Q. When?

A. I saw Mr. Flocker and Mr. Melrose put it up this morning. [62]

Q. Did you come up and examine it? A. No, sir.

Q. Oh, you did not? Have you examined it from that time up to now? A. Yes, sir.

Q. When did you examine it?

A. I looked at it at dinner time.

Q. And you say there is very little of the Squaw Valley Ranch upon that map?

A. It represents very little of the Squaw Valley Ranch.

Q. I will ask you if you can familiarize yourself from an examination of the map, as to any part or portion of the Squaw Valley Ranch correctly represented thereon? A. Certain points of it.

Q. Point out what those parts are.

(Testimony of Drury P. Osborne.)

A. Part of it up Willow Creek, and part of it Rock Creek.

Q. I wish you would step to the map and indicate with the pointer how much of that map correctly shows the so-called Squaw Valley Ranch.

A. This shows the Company land up Rock Creek (indicating on plat).

Q. At what point shown upon the map do you begin?

A. Well, it is hard—this is the corner of what is called the Fraser Creek field, that is the northeast corner of the Fraser Creek field, that was fenced in the spring of 1909.

Q. Now, wait a minute. That is the corner at the point indicated by "T" before 39, N. R., is the point to which you refer, and you say that was fenced in 1909? A. Yes, 1909.

Q. Who built that fence?

A. A bunch of Portuguese boys.

Q. In whose employment were those boys?

A. Golconda Cattle Company.

Q. How much of that fence did they build in 1909?

A. Built the complete fence, from right in about here, north; built very close, well, say the section 1, about a mile east of section 1 in township 38 north, range 39, ain't it? We ran that [63] fence north, a half and a mile and a quarter, is a mile and three-quarters, is maybe two mile; I could tell if I had the other map. Then we ran east across the north line, ran east across to this point on the creek.

Q. What point?

(Testimony of Drury P. Osborne.)

A. I am pointing at now, you see (indicates).

Q. Yes, but I want it in the record.

A. If this map is drawn right, I don't know whether this is right or not, I am going a little by your fence. Our map shows that point.

Q. Now, I wish you would examine this plat and tell me whether the black line to which I am pointing, and which extends more or less—

A. (Intg.) Don't get too far; I know where it is at.

Q. (Contg.) And which extends more or less completely around the rim of the plat, whether that line correctly represents a line of fence belonging to the Golconda Cattle Company, belonging to the North's, or known as North's fence, and belonging to Nelson, or known as Nelson's fence?

Mr. DENMAN.—One moment. I object to that question on the ground several of the fences which are on the plat are not designated. It would be impossible for the witness to tell which fence you refer to.

Mr. PLATT.—I am confining him to those three fences as indicated on the plat. (Q.) I will ask you to examine the plat and answer that question, if you can.

Mr. DENMAN.—I object to that question. It is too vague. If counsel for the Government will simply follow around the fence, take his man around the fence bit by bit, he can trace up the question, but this general question as to whether it generally illustrates, it is too vague and unfair, and liable to lead the wit-

(Testimony of Drury P. Osborne.)

ness into assertions that he cannot follow out.

Mr. PLATT.—I am asking him to go around the fence, and examine the place, and ascertain whether that correctly represents [64] the things about which I have asked him?

WITNESS.—I would not want to answer that question for one reason, that the fence is not built as a fence that stands, the part that you have here, from here, this map may represent you all right to here (indicating), might represent you a piece further; but there is places in that fence it don't represent, and it is not there to-day as it is.

Q. Let me ask you, from the point indicated near the letter "T" before 39 N. R., 37 E., following in the black, along the black line—

A. That fence is not right.

Q. (Contg.) Up to a point designated as "Opening No. 4, 100" upon the plat, state whether or not that correctly represents a fence built and owned by the Golconda Cattle Company. A. It does not.

Q. Well, in what particular, does it not?

A. Well, in the first place, you have no—this fence here represents running due east and west, that fence don't run east and west, that fence bears to the right, running east would bear south into the Company's land probably at this point, probably two or three hundred feet off the line.

The COURT.—He is speaking about the fence at what point?

Mr. DENMAN.—Running westerly from the point "T," 39 N., R. 47 E., for about an inch and a half.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Now, in what manner is that fence incorrectly represented?

A. Why, instead of running direct on the line, the fence bears about 18 degrees to the south; running from the center of 20 it bears about 18 or 20 degrees to the south.

Q. Then, as I understand it, the portion of the fence about which you have testified runs down and it goes in some of the white here [65] off of the property of the Golconda Cattle Company? A. Yes.

Q. That is what you mean, is it?

A. That is the property of the Golconda Cattle Company?

Mr. DENMAN.—That is the property.

A. The surveys I have from Mr. Nelson and Mr. Webb of this Rock Creek Ranch here, Squaw Valley Ranch, I have orders, I can show you my orders, where I have certain land to fence in them 40's that runs down, that is Golconda Cattle Company land, down Rock Creek, right there, sir; if you had the whole map I could show you. This is the east fence on the right hand side of Rock Creek, running north-east and southwest.

Mr. PLATT.—(Q.) Let me ask you again: Is the fence from the extreme southwest corner of this plat up to the first point which I indicated, the point "T," was that portion of the fence constructed by the Golconda Cattle Company, if you know?

A. Part of it was, and part of it wasn't.

Q. What part was not?

A. Probably from right to this point. I don't

(Testimony of Drury P. Osborne.)

understand your map. This is an old fence here (indicates), and the old fence runs through here; this jog in here, this fence was here when I went to Golconda; we straightened that fence up from here on up, I built the fence up to that point.

Mr. DENMAN.—Let me facilitate that.

Mr. PLATT.—Just a moment.

The COURT.—Mr. Platt is examining the witness.

Mr. DENMAN.—I was going to make an admission. I will admit that the fence from the southwest corner through to North's fence, whatever fence is shown to be there along the line of this blue property here, was constructed by persons employed by the Golconda Cattle Company.

Mr. PLATT.—Well, was constructed by the Golconda Cattle Company? Now, there is no use quibbling; if we are going to have [66] an admission, let us have it, as having been constructed by the defendant Company.

Mr. DENMAN.—You have the admission, constructed by persons employed by the Golconda Cattle Company?

Mr. PLATT.—And pursuant to those orders.

Mr. DENMAN.—Well, the orders will develop later on.

Mr. PLATT.—I will take the admission, if the Court please, for what it is worth.

Q. Did you aid in the construction of the fence just outlined by counsel for the defendant company?

A. Well, yes. That is, now, I am testifying—I am not testifying that this fence as you represent it here

(Testimony of Drury P. Osborne.)

is as my surveys; we built the fence, and I am testifying by the fence as I built it by the surveys I had, not by the line you have drawn. If that represents it, if you run this exactly, your engineer or anybody, has run this fence from the point around to where you say, and that represents with the field-notes or survey line that I built that fence by, or had the fence built by, the fence then would be correct, otherwise the fence is not correct.

Q. Then as I understand it, so far as you know, you built a fence from a point designated at the extreme southwest corner of the plat, and running in a north-easterly direction, up to a point at the intersection of North's fence?

A. This question here—if the question as Mr. Denman put the question considered that the Golconda Cattle Company built the old fence, then the Golconda Cattle Company built the fence around that country.

Q. Now, I call your attention to the same point at which I began before, namely, the southwest corner of this particular plat, and I direct your attention to the black line, assumedly representing a fence, and I will ask you whether you aided in the construction [67] of that fence extending from that point in a north-easterly and easterly direction to a point indicated as the beginning of a gap in section 36 of township 39 north, range 48 east.

Mr. DENMAN.—Do you refer to the black line?

WITNESS.—No, I didn't build no fence like that.

Mr. PLATT.—(Q.) Do you know, as a matter of fact, whether the fence which I have indicated was in

(Testimony of Drury P. Osborne.)

fact upon the land of the Golconda Cattle Company at the time you assumed the foremanship?

A. This fence (indicating on plat)?

Q. Yes. A. It was not.

Q. Who, if you know, built this fence?

A. There was a fence built, not representing your line.

Q. Do you mean to say there was not a fence connecting at the original point from which I started, built along the side of what is designated on the plat as Willow Creek, running along past the reservoir, and crossing what is known as Hot Creek, up to the gap in section 36?

A. No fence represents that line.

Q. No fence there at all?

A. As your line run; there was a fence, but not on the line as you have the fence drawn.

Q. Where was it?

A. Well, in the first place, it is right here.

Q. Well, where is "right here"? Now, wait a minute, that is the first place, is it (indicating)?

A. That is one of them.

Q. Now, up to a point indicated as the commencement of the new fence, shown by the red line near opening No. 7, up to that point, the fence is correctly delineated?

A. If it is according to the field-notes and survey; I double surveyed there; I had Mr. Nelson survey it first, then I paid him \$58 to resurvey it in the spring, after a heavy snow. If that fence is on the line them flags were, with them field-notes will show I built

(Testimony of Drury P. Osborne.)

the [68] fence on, you are correct, otherwise you are wrong.

Q. Who did you build this fence for?

A. Golconda Cattle Company.

Q. While you were foreman?

A. Superintendent; I had raised a notch or two.

Q. From the point in which we stopped, section 28, township 39 north, range 48 east, state whether or not the black line correctly represents the fence as it was prior to April, 1910.

A. It does not. The line from that point up to here don't represent the fence at all.

Q. Well, now, where was the fence?

Mr. DENMAN.—We object to the question on the ground that fence was not a fence in existence at the time the suit was begun, and to show the line of the fence that did not exist on the 31st of May, is simply wasting the time of the Court.

WITNESS.—It never existed.

The COURT.—I don't see as it is material, Mr. Platt. If you have a point, you can put it in subject to objection.

Mr. PLATT.—The only thing is, I want, if I can, to establish the building of this fence in April, 1910; this red fence as a substitute for this other fence, that is all I desire to show by the witness, if he knows. I will withdraw the question, though.

Q. Now, I will ask you whether the red line as indicated on the plat, from the point in section 28, which I have indicated, correctly represents the fence built by the Golconda Cattle Company? A. It does not.

(Testimony of Drury P. Osborne.)

Q. Well, in what regard does it not?

A. Well, in several.

Q. What are they?

A. Well, places where the fence comes, you haven't the corners where the fence turns, and you haven't the sways in the fence, where the fence follows the road; the fence is all on the north of the road. We have an understanding [69] with the Supervisor—

Q. I don't care anything about that.

A. I say the fence don't represent it.

Q. You say the fence is all along the north road?

A. Your red line fence don't represent the fence.

Q. In what particular does it not? A. Several.

Q. Point out the particulars.

A. You haven't the turns around the reservoir right; you haven't the fence right around here; it is guess-work with you.

Q. Show where the fence is guesswork and where it is wrong.

A. I could not do that without a plat, and show on a real map, then I can show you exactly the Tuscarora road line, how the fence bends, and one thing and another. There is a fence, but your red line does not run as the fence runs.

Q. You have a distinct recollection in your mind just about the course in that reservoir?

A. Well, I might have forgotten it. I know there is curves, and I know there is corners; I know the way the fence comes up to the dam, and the way it goes over the dam, and around to the Tuscarora road.

Q. You say that fence does not correctly represent

(Testimony of Drury P. Osborne.)

the exact condition of the fence as it was in April, 1911? A. No.

Q. When were you last upon the property of the Golconda Cattle Company as shown here by the plat?

A. At that certain point?

Q. I asked upon the property.

A. Of what you have on the map?

Q. Anywhere. A. On the map?

Q. Yes. A. On this map of yours?

Q. Yes. A. It has been probably 9 months.

Q. You are sure you have not been there since?

A. I have been to Squaw Valley since, but not that part of it. [70]

Q. State whether or not the fence indicated in the red from the point which I originally designated in section 28, approximately represents the fence of the Golconda Cattle Company. A. It does.

Q. There is no question about its being joined to the intersecting point at 28 in the black, is there?

A. It is not joined.

Q. It runs right along approximately as indicated on the plat?

Mr. DENMAN.—You are not speaking of the openings in the fence?

Mr. PLATT.—I am speaking about the fence.

WITNESS.—He said it joined; it does not join.

Q. Where is the opening?

A. I don't know whether you have the exact spot or not, but the opening is in the lane, right there.

Q. Will you say that the opening shown here upon this plat, opening No. 7, 100, is in the wrong place?

(Testimony of Drury P. Osborne.)

A. Yes, sir.

Q. Now, you say that an opening is in the lane, don't you?

A. I say the opening at that place there does not represent where the opening is.

Q. I ask you if you didn't testify that the lane went through the opening in the fence?

A. Well, I might testify to that.

Q. Just a moment. I ask you if you didn't testify that the lane went through the opening in the fence?

A. I never answered that, did I?

Q. I ask you now to state whether or not you did not testify—

A. (Intg.) When did I testify?

The COURT.—Just listen to the question, and then after he asks the question, answer it, if you can.

WITNESS.—He gets mixed up.

The COURT.—Never mind, listen to the question, and if you don't understand it, we will have it asked again. [71]

Mr. PLATT.—(Q.) I ask you whether or not you did not testify that the lane ran through the opening in that fence?

A. No, the lane don't run through the opening. The lane runs through the opening; you could twist that two or three ways; the lane commences at the opening.

Q. The lane commences at the opening?

A. Yes.

Q. Now, does the lane run under the lower barb wire of the fence, or is there an opening in the fence

(Testimony of Drury P. Osborne.)

through which the lane runs?

A. There is an opening commencing with the lane.

Q. Now, I call your attention to what is designated here on the plat as the lane and road—

Mr. DENMAN.—Where is it designated road and lane?

Mr. PLATT.—Well, it is designated as the road.

(Q.) I will ask you if it is not a matter of fact that the lane is an extension or part of the main road.

A. Yes, that is, at the present time; it wasn't till we built the fence.

Q. Well, when was it made an extension of the main road? A. The first of April, 1911.

Q. About the first of April, 1911. Now, I ask you to examine this plat, upon which is indicated in the dotted lines this road and the lane which is an extension thereof, and state whether or not the road and lane does not run through an opening in that fence?

A. Well, at that certain point?

Q. Yes.

A. I could not say by your map. If you will tell or if I could see with the map where I built these fences by that spring, then I could tell you whether that is the lane or not, or whether the lane is down here (indicating).

Q. Well, you are positive, aren't you, that this lane and road runs through an opening in the fence indicated upon the plat by the red lines?

A. I don't know whether it is indicated by the red line. That is all right. I will say to the Court [72] that the opening is not at that point in the fence.

(Testimony of Drury P. Osborne.)

Q. How do you know it is not?

A. Well, I know it.

Q. Well, how do you know it?

A. I surveyed that country myself; I know the location of it, I know which way the fence runs, and I know that that opening, unless it has been cut since the first day of July, and a lane put in it, does not exist.

Mr. LEWERS.—If the Court please, I object to this method of interrogation; it is unnecessary. The witness has not shown an unwillingness to answer questions, and it is an attempt to cross-examine and badger his own witness.

Mr. DENMAN.—I think I can conceive what he wants.

WITNESS.—I will tell you, Mr. Flocker ought to have drawn the map so—

The COURT.—I think you may take your chair; roll the blackboard back there. It is very difficult to hear, and when we are all so near the witness he accommodates his voice to the person he is talking to, and the result is the reporter don't get it.

Mr. DENMAN.—Now, if the Court please, we will concede that at approximately the point indicated as Opening No. 7, 100 feet—

Mr. LEWERS.—Near the center of section 28.

Mr. DENMAN.—(Contg.) Township 39 north, range 48 east, is a lane, constructed about the first of April, 1911, through which runs the Tuscarora-Midas road and that lane was constructed by Mr. Osborne, or under his direction.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—(Q.) Can you state whether or not the opening to which your attention has been directed is in section 28 of township 39 north, range 48 east?

A. I could not.

Q. Do you know whether it is in section 1 of that township and range, or not?

A. I can take the map that I have done that work by, and tell.

Q. But you don't know from independent recollection, do you? [73] A. No, I don't, but—

Q. But you are positive—

Mr. DENMAN.—Let him finish the answer.

A. But I am positive that I know where you have the opening marked in the red line is not in the right place.

Mr. PLATT.—(Q.) How many chains to the east, how many chains to the north, how many chains to the south, or how many chains to the west must that aperture be moved in order to make it accurate?

A. That is up to you.

Q. Is that your answer to that question?

A. I could not tell you, because I don't know.

Q. And yet you know it is not in the right place?

A. I know it is not in the right place, but how many chains one way or the other, I could not tell you.

Q. And that is your answer to the question?

A. Yes, sir.

Q. Now, I wish you would examine this map—

A. The Honorable Judge told me to take my chair.

The COURT.—Wait a minute. Just listen to the question.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—(Q.) I wish you would examine this map, and more particularly the red line, from the intersecting point in section 28, running to a point designated as Opening No. 6, $\frac{1}{4}$ of a mile, and state whether or not, if you know, the Golconda Cattle Company built that fence?

A. They did.

Q. Now, you state that without looking at the map?

A. I can see it from here.

Q. Do you know when they built it?

A. Yes, we built that fence probably in, well, I could not say positively; we was constructing that fence in March and April, probably, had two or three gangs of men there.

Q. In what year? A. 1911.

Q. Do you know when it was finished?

A. Well, no; I could [74] not exactly say what date it was finished. I know that it wasn't finished, the fencing we were doing there, and the fence gang, I will answer that question: The fencing we was doing in that locality at the time this fence was built, I know that the fence, the fence gang wasn't moved away, or wasn't completed the first day of July, 1911; the fencing in that locality wasn't.

Q. I am asking you about a specific line of fence, and I ask you whether or not that fence was completed in the month of April, 1911?

A. Well, I could not say for certain whether it was or not; I might have had a gang of men there; I didn't stay up there; the men might have completed it in April, or might not have completed it until May.

(Testimony of Drury P. Osborne.)

I went up and lined out the fences on the north side of the dam, and put a gang to build the fences, and I didn't stay there and watch them every day to see where they was working.

Q. Well, you don't know, do you?

A. Could not say for certain it was; it might be and might not.

Q. Then you don't know, do you?

A. I don't know as I do know. The date, you asked me if I know the date; I don't know the date.

Q. Well, do you know about what time that portion of the fence to which I have directed your attention was completed?

A. I think it was completed before the end of April; yes, I think that fence was.

Q. Are you positive about that?

A. Well, there is the question about that. No, I ain't positive.

Q. You say you are not positive as to the exact date? Are you positive that portion of the fence was completed some time during the end of April?

A. During the end of April, yes, that might be.

Q. Might it be, or are you sure of it? [75]

A. You hammer at me—

The COURT.—Wait a minute.

Mr. LEWERS.—I object to this manner of cross-examining his own witness, and an attempt to confuse. The witness has answered fairly, and without any hesitation on all occasions, and the witness has labored under the difficulty that is to be regarded, of having trouble in hearing; but, notwithstanding, he

(Testimony of Drury P. Osborne.)

has not manifested any disposition to be adverse, hostile or unfair; and I think we will get along a lot faster if counsel will treat him in a proper manner.

Mr. PLATT.—I am obliged to talk loudly so the witness can understand me; that is why I am raising my voice; there is nothing heated about my questions; I simply want the witness to say whether he knows or does not know, and I am trying to get a categorical answer to my questions, if I can. If he does not know, I want him to testify that he does not know, and if he does know, I want him to say so.

Mr. LEWERS.—Then it does not make any difference whether it was the first or last of April; it is immaterial, anyhow.

The COURT.—Do you understand what he wants now?

WITNESS.—I understand. He first asked me if I could tell him positively when it was finished. I could not. Then he said was it approximately in the last of April; I told him it might be. Then he says you are positive it was completed in the last of April. There is the question back over again. I ain't positive, and he comes right back at me the second time.

The COURT.—(Q.) You don't know whether it was that month?

A. I do not. It might have been finished in April, Honorable Judge; it might have been finished in April, or it might not.

Mr. PLATT.—(Q.) Then you don't know whether it was completed in [76] April or not, do you?

A. Yes, that is it.

(Testimony of Drury P. Osborne.)

Q. Now, I call your attention to another part of the fence, beginning at the other side of the opening, and indicated upon the plat in the red, and will ask you if you know who built that fence, or that portion of the fence?

A. The Golconda Cattle Company.

Q. Now when was it built, if you know?

A. Probably in March.

Q. Of what year? A. 1911.

Q. Do you know when it was completed?

A. No, sir.

Q. Do you know about when it was?

A. Some time in March.

Q. I call your attention to that portion of the fence indicated in the black, and beginning where the red leaves off, and extending up to a point indicated upon the plat as the beginning of a gap, and will ask you if you know who built that portion of the fence? A. In the black?

Q. Yes. A. Golconda Cattle Company.

Q. When was it built? A. 1910.

Q. I call your attention to a fence indicated at the red, beginning where we just left off, extending in a northerly direction up to a designation on the map as "Opening No." blank; "300 feet, opening at Nelson's new fence line," and I will ask you if you know who built that fence?

A. Golconda Cattle Company.

Q. When? A. The first of March, 1911.

Q. When was it completed?

A. Well, now, that I could not say; that fence was

(Testimony of Drury P. Osborne.)

all under construction at one time. We commenced at the job where you started there, one crew was working one way, and one crew was working the other; when it was completed, I could not tell; it was completed some time in March.

Q. Do you know approximately when?

A. I say it was completed some time in March.

Q. You are sure it was completed some time in March?

A. I am pretty certain, March or—yes, March.
[77]

Q. I now call your attention to what is represented upon the map as the beginning of a fence shown to be indicated by a red line from a point on Nelson's fence, running in a general northerly direction, up to an arrow, indicative of the "Opening No. 5, North's fence to Noble's fence," and ask you if you know who built that part of the fence?

A. I do not.

Q. You did not aid in the construction of that fence? A. No, sir.

Q. Do you know whether or not it was built while you were in the employ of the Golconda Cattle Company? A. I never saw it.

Q. Never saw it? A. No.

Q. Do you know what general use was made of the lands by the Golconda Cattle Company, within the fence indicated upon the plat?

A. The territory? You mean between Rock Creek and Willow Creek?

Q. Between Rock Creek and Willow Creek, and

(Testimony of Drury P. Osborne.)

the lands within the fence indicated as North's fence and Nelson's fence?

A. What is the question, Mr. Platt, please?

Q. I ask you if you know what use the Golconda Cattle Company made of the lands within the fence which I have just described?

A. The Golconda Cattle Company made no more use of that lands—well, they made no use of it only in rodeoing and gathering and driving through it, just the same as any of our neighbors did.

Q. Well, what use did they make specifically, what use did they make of those lands?

A. Just as I told you.

Q. Did they ever graze in those lands?

A. Turn cattle in there; that is, cattle drifted in there same as anybody else's.

Q. Did the Golconda Cattle Company cattle ever graze within those lands during the time you were there?

A. In the spring of the year as the cattle went north, the Golconda Company's cattle, part would go in that country, part one [78] way and part another, and they drifted in through that country, just the same as any other cattle.

Q. Indiscriminately over the country?

A. Yes, sir.

Q. What kind of land generally is within that enclosure?

A. Well, that is a barren country, without any water whatever in that inclosure, outside of the Company's land on the creek. The Company's land

(Testimony of Drury P. Osborne.)

on the creek has water; outside of that that ridge country is a barren country, good for about two months. Tom Nelson starts in at Rock Creek, and lambs through that country up in April and May, and gets up in his fields in April and May; he uses it for lambing; there is no water on it any place outside of the Company's lands on the creek.

Q. You are sure that inclosure is used—

Mr. DENMAN.—One moment. Object to the word “inclosure.”

Mr. PLATT.—I use it advisedly, I think the witness knows what I mean.

Q. You say the lands within the fences which you and I have both described, are good for at least two months in the year?

A. Two months in the spring.

Q. For grazing purposes?

A. For sheep only; that is, sheep only, for that part of the country. Yes, sheep only, you might say.

Q. Could cattle or horses possibly graze over those lands for two months of the year?

A. Yes, they would exist there.

Q. They would get along there, wouldn't they?

A. Oh, yes.

Q. Now you say Nelson runs his sheep, or has run his sheep into this inclosure?

Mr. DENMAN.—Object to the word “inclosure.”

Mr. PLATT.—(Contg.) For a period of two months during the year, occasionally?

A. I will explain that, Judge, if you will let me.

(Testimony of Drury P. Osborne.)

The COURT.—Wait. Whenever the lawyers make an objection, wait.

Mr. DENMAN.—I object to the question on the ground the word “inclosure” is used.

The COURT.—Can't you use some other term?

Mr. LEWERS.—Say Government land.

Mr. PLATT.—That is not what I mean; I mean all of the land within that fence.

The COURT.—Well, I shall not be misled by it.

Mr. LEWERS.—The danger is this; it may appear in the record hereafter that the witness referred to that as an inclosure.

The COURT.—Speak of it as the land between Rock and Willow Creeks.

WITNESS.—That would include patented lands of other people the same as Government land, would it?

The COURT.—Yes.

Mr. PLATT.—(Q.) Now, how often have you seen cattle, stock of any kind or description whatever, sheep or horses belonging to the Golconda Cattle Company grazing upon any of the lands represented in the white upon this map? A. In the white?

Q. Yes.

A. Well now, just the white. That is supposed to be the Government land, is it not?

Q. Yes.

A. Well, I suppose I have saw Golconda Company's cattle, and other people's stuff in there, every year more or less, in the spring of the year all the

(Testimony of Drury P. Osborne.)

time I was in the employ of the Golconda Cattle Company.

Q. What was the Golconda Cattle Company's stock, horses or sheep doing in there?

A. Well, they was just like anybody else's; they was turned loose probably on the river 15 miles from there, and drifted right up in there, and went right in on them creeks there to the water. [80]

Q. Were they grazing upon these lands represented in the white?

A. Well, I suppose they would take a bite or two as they went through, if they could find it.

Q. Do you know, as a matter of fact? I don't want any suppositions. Do you know, as a matter of fact, that cattle, horses, sheep and other stock belonging to the Golconda Cattle Company grazed and fed at any time during the year upon the lands indicated in the white upon the plat?

A. Well, I never stopped to see whether they was eating, I naturally supposed they was, same as anybody else's cattle; I didn't take the time to watch whether they was or not.

Q. For how many years can you state positively that the stock of the Golconda Cattle Company herded and grazed upon the lands to which your attention has been directed?

A. Now, "grazed on the land," I don't know, Judge, just how to take that. Golconda Cattle Company's stock, cattle, sheep, or horses never stopped and camped at anything that is on the white; they might have drifted through; the Company's stock

(Testimony of Drury P. Osborne.)

would go up Rock Creek, camp on Toejam, and lamb on Toejam; and Nelson would use all of the Willow Creek and Siawappe country in there, he has a right in there and nobody ever disputed it, I guess, for 20 years.

Q. Who gave Nelson a right in there?

A. Stockmen's rights, and respect for your neighbor.

Q. Do you know who gave Nelson any rights in there?

A. He had a right among us, any right that stockmen in any country has certain lines that they respect as neighbors in grazing stock.

Q. What lines were respected here as between Nelson and the Golconda Cattle Company? [81]

Mr. DENMAN.—I cannot see the relevancy of this examination. The question is whether or not on a certain day there was an inclosure which the Government prohibits under a certain statute, and I cannot see the relevancy of this. We have admitted the ownership of the land in there; we have a description of the fence as it is claimed to be to this point; we have everything before the Court that can determine in the Court's mind whether or not that fence should be down; and I cannot see the relevancy of this testimony we are going into, and I don't see the bearing on the case.

The COURT.—I supposed the purpose was to lead up to the use, if any, that was made of this white land between Rock and Willow Creek by the Golconda Cattle Company. That is the only purpose I can

(Testimony of Drury P. Osborne.)

see; but instead of asking the question directly he has been trying to lead the witness to it. Now, the rights of Nelson, he had no legal right in there, as I understand it, and I don't know that it is necessary to go into that matter. He had a right that is respected, as the witness says, among stockmen; they sort of apportion the country out among themselves, and it was a law among themselves, and if they respected it, it was all right, and if they did not respect it, there was no law which would compel them to.

Mr. PLATT.—If the Court please, there is another angle concerning cases of this character, and while I don't deem it is necessary to establish by proof the fact that there was an exclusive ownership and control and manipulation of lands alleged to be inclosed, or that there was an intent upon the part of the defendant company to exclude others from grazing their cattle upon the land, yet at the same time I believe that any testimony which tends to throw light upon an exclusive ownership, or a claim of right asserted to Government lands, as alleged in this bill of [82] complaint, is competent testimony in a case of this character.

Mr. DENMAN.—To what issue?

Mr. PLATT.—Upon the issue to an asserted claim of right to the exclusive use and control of the lands alleged to be inclosed by the fence, in this bill of complaint.

Mr. LEWERS.—You allege that as a part of the necessary foundation to your case.

Mr. PLATT.—I expressly stated, if the Court

(Testimony of Drury P. Osborne.)

please that was not my contention. I contend if the Government proves in a case of this character that there was an unlawful inclosure maintained, namely, an inclosure maintained by this defendant Company inclosing Government land, that that of itself, irrespective as to whether it was exclusive or not, constitutes a violation of this law. But I do say that questions of intent have been considered by some courts, and questions of exclusive ownership have been permitted as a part of the issues raised in cases of this kind in order to enable the Court to understand whether there was a claim of exclusive right, which is simply an aggravation of the offense.

Mr. DENMAN.—Do you contend it would make any difference about putting up the fence or taking it down, this is an equity suit, whether or not there was an exclusive ownership in there? I am not talking about a criminal case now, but in an equity suit, is it your contention that it makes any difference?

Mr. PLATT.—There is a respectable line of authorities upon the question of intent in equitable actions, I believe the weight of authority is the other way, as I expect to argue to your Honor at the proper time. It has been held in the case of the United States against Johnson that there is a question of intent involved even in a civil suit, and it is for the purpose of meeting [83] cases of that character that I am trying to ascertain the asserted claim of right to an exclusive ownership of the lands alleged to be enclosed. I state to your Honor frankly, as I expect to argue in the future, that the weight of

(Testimony of Drury P. Osborne.)

authority is the other way, and that the intent need not be disclosed in an action of this character, either in a criminal or civil suit.

Mr. LEWERS.—We withdraw the objection.

The COURT.—Your question also goes to the extent of the use that the Golconda Cattle Company has made of these lands, whether it has been an exclusive use, or used it in connection with other people?

Mr. PLATT.—Yes, your Honor. I think your Honor is entitled to that testimony. Not that it is necessary for the Government to prove that, but in order to meet every angle of the case, I believe it is material testimony. I submit I have shown in the question, and during the examination that this is a hostile witness.

The COURT.—Let me ask the question. (Q.) Did the Golconda Cattle Company make any use of that land?

A. None at all; the white land, none at all, never claimed it.

Q. Did anyone else ever make any use of it?

A. Nelson has used that land, and been respected, ever since the Golconda Cattle Company bought Squaw Valley, and had that,—Sibbles and Savage, when I went there they told me to respect it, never to try to crowd Nelson out of his range rights, and I never did.

Q. How far west did Nelson use that land?

A. Nelson commenced right at the point where the lane leads through, commenced right on there with his lambs, go up about a mile and a half to the first

(Testimony of Drury P. Osborne.)

jog in the fence, come up to the [84] dam, right at the dam, go up there and camp, then use that country from there all up and down the dam, up Siawappe, around his field, Noble's field, and around his place; he has used that for the last 20 years for his ground, nobody has bothered him; the company has never turned no stock in there, and never claimed no right in that open ground; from myself, I know, and more than that, they handed it down,—Mr. Sibbles and Mr. Savage, I was foreman when Sibbles was manager, told me to respect them rights, and that is the way it is to this day.

Q. The question I asked you is, how much of that land they have used; as I understand from your answer, Nelson has used all of the land east and north of the road, which leads from Midas through that big field?

A. East and north, yes, approximately, and directly right up the creek probably a half a mile; we came out from the Toejam Creek probably a half a mile, and lambed; and Nelson came down after us, didn't come out in the hills at all, came half a mile from the creek. We lambed north, we would take our sheep and put them across Toejam, and let them drift into Rock Mountain.

Q. But all of your sheep lambed west of Toejam?

A. Well, Toejam almost runs—yes, the bulk of our sheep.

MR. DENMAN.—Do you refer to—

A. (Intg.) The bulk of our stuff, while I was

(Testimony of Drury P. Osborne.)

superintendent all lambed west of Toejam and Rock Creek.

Mr. LEWERS.—That would be outside?

The COURT.—To the west.

WITNESS.—I will point to it on the map. Now, here is Toejam (indicating), here is Rock Creek runs on away up into this country on top of Rock Creek and Tuscarora Mountain, we commenced to lamb in here (indicates) what is called Six Mile, we start in right here on Six Mile, and I go onto Trout Creek and go on to Ford [85] Creek, so on up to Noble's fence, there we respect Noble; Noble would lamb out here, we respect him.

Q. Do you use any land south of Rock Creek?

A. Yes, we use the point of land south of Rock Creek, between Toejam and Rock Creek, we use probably, as I say, about a half a mile wide from Noble's fence, half a mile wide right along on Toejam; that is on the water, we camp on the water. Nelson has no water, that is the reason he commences on this country here, and starts right up and drops his lambs this way, and comes on up here; he lambs about fourteen thousand ewes in that territory, and works them up to his country right in here (indicates).

The COURT.—That is all.

Mr. PLATT.—(Q.) Do you know of any sheep belonging to the Golconda Cattle Company grazing upon the Government land, as indicated upon the plat?

A. In there (indicating)?

Q. Yes.

(Testimony of Drury P. Osborne.)

A. No, sir, not since I was superintendent.

Q. You never saw any sheep in there at all belonging to the Golconda Cattle Company?

A. Not where you are pointing; as I say, right along the creek.

Q. Did you ever see any sheep upon any part of the land indicated on the white upon this plat, and within the fence line, belonging to the Golconda Cattle Company? A. In the fall—

Q. What is that?

A. Let me explain to you. In the fall, probably, when we came down—

The COURT.—He has asked whether you ever saw any there. If you would answer that yes or no, we would understand a great deal better.

A. I don't want to, I want to explain why I would answer yes.

Q. Explain that later. Answer yes or no, you have seen them or have not seen them. [86]

Mr. DENMAN.—Then you can explain your answer.

A. I will say yes to that question. I started in to explain why I say yes.

Mr. DENMAN.—You can go ahead and explain.

WITNESS.—Have I a right to explain, Honorable Judge?

The COURT.—Yes, if you will be brief about it.

A. We came down in the fall, sometimes we would bring dry sheep, come down the St. John's road with dry sheep, drop in there in the dam, hold them there by the dam where they would get water, maybe cross

(Testimony of Drury P. Osborne.)

there a mile or so from the dam, or cross the dam south, coming down the Tuscarora road there, we would bring them down to the ranch and separate them, and take them to the southern country. We don't stop there, we camp there maybe one day in a place, coming down, maybe move four or five miles a day, we will camp as we are coming down, camp with them sheep there as we are coming from the Squaw Valley ranch going to the Rock Creek ranch, as we go to the southern range in Austin.

Mr. PLATT.—(Q.) As I understand, the sheep of the Golconda Cattle Company as they are being herded south, graze upon some of the lands represented by the white on the plat?

A. Just the same as all the other sheep men, they come down the trail, and they graze.

Q. You understood that question, didn't you?

A. Yes.

Q. Your answer is what?

A. My answer is that they graze approximately, one way from the trail, to the other; any stockman will understand that.

Q. State whether or not you know approximately the distance from what is represented as opening No. 1 to opening No. 4 upon the plat.

Mr. LEWERS.—The plat will speak for itself, will it not? [87]

A. Well, it would be probably in the neighborhood of 8 miles.

Mr. PLATT.—(Q.) State whether or not you know that prior to the month of May, 1911, there

(Testimony of Drury P. Osborne.)

were any openings in the fence between Opening No. 1 and Opening No. 4, a distance which you say of 8 miles?

A. Well, Mr. Platt, what do you constitute an opening?

Q. Were there any gates, or were there any—

The COURT.—Gaps in the fence.

Mr. PLATT.—Were there any gaps in the fence?

A. There was gates.

Q. How many gates were there from Opening No. 1 to Opening No. 4? A. Two wire gates.

Q. Where were they located?

A. One of them was located close to the corner of section 9, I can't tell you with the map, right here (indicates), it is close to the corner of section 9; and the other was right opposite, below Hot Spring, right opposite a dam in Rock Creek.

Q. Do you know what section the dam was in?

A. I do not.

Q. How big an opening did these two gates make?

A. Well, the gates would be 32 feet, just the distance of one post, the wire gate made a difference of one post.

Q. They were swinging gates?

A. They were not swinging gates, a wire gate don't swing; same as any stockman puts up a bar; to open it up, bring it back and take the posts from the wire, and bring it back.

Q. Those are the only two gates you know of in that distance of 8 miles?

Mr. DENMAN.—At what time?

(Testimony of Drury P. Osborne.)

WITNESS.—In the spring of 1910, you say.

Mr. PLATT.—That is, up to the month of May, 1911. A. Up to May, 1911?

Q. Yes. [88]

A. There was no opening outside of them gates. There was that gate at Rock Creek, and them two down the line, yes.

Mr. DENMAN.—You don't include the month of May; that is up to the first of May?

Mr. PLATT.—Up to the first of May.

Mr. LEWERS.—The 31st, when you filed your suit.

Mr. PLATT.—(Q.) Well, when, if you know of your own knowledge, were there any additional openings made in that fence, if at all?

A. Well, there was, yes. There was an opening made in there in May or in June.

Q. Well now, which was it? A. It was in June.

Q. It was in June, was it?

A. I think it was in June.

Mr. DENMAN.—Are you sure?

Mr. PLATT.—Now, when in June, if you know?

A. Well, probably along about the 10th or 12th, somewhere that part.

Q. You are talking pretty low.

A. I ain't afraid to talk loud to you, either.

Q. This is for the stenographer's convenience.

A. I say about the 10th of June, somewheres along.

Q. How do you fix the dates as being about the 9th or 10th of June?

A. An order came to me to make some openings in

(Testimony of Drury P. Osborne.)

the fence so stock could drift through along about that time, and I made it.

Q. Who gave you those orders? A. Mr. Kent.

Q. What Kent do you mean? A. William Kent.

Q. Well, what official position, if any, did he hold with the Golconda Cattle Company?

A. I suppose he is Congressman, they say he is.

Q. I am not asking you that. What official position did he [89] hold with the Golconda Cattle Company, if any?

A. I suppose he is president; I never see him sign his name as president of the Golconda Cattle Company.

Q. In what manner were these instructions given to you?

A. They was sent from Washington.

Q. Was it a written communication? A. No.

Mr. LEWERS.—You are better able to furnish that information; it was done at the request of your department.

Mr. PLATT.—If the Court please, that is uncalled for. The information I have is not testimony.

The COURT.—If counsel asks the witness a question, if it is not a proper question, make an objection; and if it is a proper question, the witness will answer.

Mr. PLATT.—(Q.) What kind of a communication was it?

A. I think it was a telegram.

Q. From whom did the telegram come?

A. The telegram came to Mr. Petrie of Golconda.

Q. And by whom was it signed?

(Testimony of Drury P. Osborne.)

A. I never saw it.

Q. How do you know then that the instruction came from Mr. Kent, the president of the Golconda Cattle Company? A. Mr. Petrie told me so.

Mr. DENMAN.—I move to strike out the testimony regarding the communication of Mr. Kent, on the ground it is hearsay.

Mr. PLATT.—I think it is a proper motion. I am trying to get the information, if I can.

The COURT.—It may be stricken out.

Mr. PLATT.—(Q.) Who is Mr. Petrie?

A. At that time Mr. Petrie was living in Golconda; I don't know as he held any title whatever.

Q. Was he employed by the Golconda Cattle Company? A. That I could not say. [90]

Q. Did Mr. Petrie give you instructions about the 9th or 10th of June then, to make these other openings in the fence?

A. He told me over the telephone that he had a telegram, or something, from Mr. Kent to make these openings.

Q. Why did you observe the instructions of Mr. Petrie, if you didn't know who he was?

A. I have had many a second-handed thing handed to me, and obeyed it.

Q. Was it your custom at that time to receive instructions for work upon the ranch from strangers?

Mr. LEWERS.—To which we object, if the Court please, that this entire line of interrogation is improper and irrelevant to any issue in this case. It is obviously based upon hearsay testimony, which

(Testimony of Drury P. Osborne.)

was stricken out by consent a few moments ago, and what bearing it has on the issues in this case, I don't know. If they desire to go into that question, counsel has in his possession, as I have already stated, ample information, without trying to get it second or third hand, as it appears from this witness.

Mr. PLATT.—I have not such information. The information which this witness has given me is the first information of the character I ever received.

The COURT.—I assume your purpose is to show by what authority these openings were made?

Mr. PLATT.—Precisely.

The COURT.—You may go on and question him, if you wish to do so. Even though you had that information in your possession, [91] I do not know whether the Court could compel you to resort to that information, rather than to take this. I think you are at liberty to prove your case in any way you see fit, provided you are within the rules of evidence; and if you see fit to prove that by this witness, I cannot prevent you.

Mr. LEWERS.—Our objection was on the ground it was purely hearsay, and based on hearsay testimony, stricken out by consent. This witness has testified as to his receiving information from Mr. Petrie concerning a telegram. That was stricken out by consent. Now, the examination follows along that line, and obviously it is based on evidence no longer a portion of the record, and we object to it on the ground it is hearsay.

The COURT.—That was stricken out; the contents

(Testimony of Drury P. Osborne.)

of that telegram were stricken out, and the fact that Mr. Kent sent it, because that is hearsay. But it is in evidence that they did open this fence; that he received orders to do so from Mr. Petrie. He testifies that he don't know what Mr. Petrie's title was. Now, Mr. Petrie undoubtedly gave orders which this witness respected, and I do not see why it is not perfectly relevant and proper if this witness knows, for him to testify why he obeyed Mr. Petrie's suggestion. If you know that, it is proper testimony.

Mr. PLATT.—Read the question.

(The Reporter reads the question.)

A. It was not.

Q. Why then did you observe the instruction given you by Mr. [92] Petrie?

A. Well, I will tell you why if you—I will explain it to the Judge so he can see it. I had resigned my position, and Mr. Petrie was supposed the first day of July to take my position; and when he had the orders come from Mr. Kent for me to open the fence, Mr. Petrie acted the gentleman, and told me that he had orders from Mr. Kent for us to open them openings, and I obeyed for that one reason, Mr. Petrie's orders.

Q. Do you know whether or not Mr. Petrie was employed in any capacity by the Golconda Cattle Company?

A. I do not, only a supposition with me, I had resigned.

Q. Do you know who took your place?

A. I don't think anybody did.

(Testimony of Drury P. Osborne.)

Q. Do you know who afterwards performed the duties which you performed? A. Yes.

Q. Who was that? A. Three or four of them.

Q. Was Mr. Petrie among them? A. He was.

Q. How do you know that he was?

A. Well, I introduced Mr. Petrie into the business.

Q. Upon whose instructions did you introduce him into the business? A. My own.

Q. Do you mean that you took instructions from yourself?

A. To show him, and to turn my business over, part of it, to him, and afterwards when I left, he divided up what I was doing amongst two or three.

Q. Who told you to turn the duties of your office, or a part of it, of your business, over to Mr. Petrie?

A. Who told me?

Q. Yes. A. I told myself.

Q. Did you have any authority from the Company for so doing? A. I did not.

Q. Did anybody tell you that Mr. Petrie was going to succeed you? A. Yes. [93]

Q. Who told you that? A. Mr. Kent.

Q. Do you mean the President of the Golconda Cattle Company? Now, what did Mr. Kent tell you about Mr. Petrie succeeding you?

A. I don't know as I have to answer that question.

Q. Well, it is up to the Court.

A. I will leave that to the Judge.

The COURT.—You can answer just what he said to you with reference to putting Mr. Petrie in your place. If he talked to you about anything else, we

(Testimony of Drury P. Osborne.)

don't want it. Just simply what he said about Mr. Petrie taking your position.

A. I resigned. I had a telegram from Mr. Kent, saying Mr. Petrie was in charge, full charge, and there is why I turned it over.

Mr. PLATT.—(Q.) Then you received a telegram direct from Mr. Kent, that Mr. Petrie was in full charge? A. Yes.

Q. And it was upon that telegram that you turned your business over to Mr. Petrie?

A. No, sir, I had told Mr. Petrie two weeks before that, I told him if there was anything he wanted to do, or wanted to attend to, to go ahead, that I would resign the first day of July and then he would have full control, and any new work he wanted to do, he had a perfect right to go ahead, but up to the first of July I was the king pin.

Q. Then who, if you know, made the other openings in the fence, or that portion of the fence which you have just described, after the 9th or 10th of June, 1911?

A. You mean up to that point you speak of up there?

Q. Yes.

A. I don't know as there is ever any more openings in it, I don't know of any.

Q. I call your attention to Opening No. 3 upon the plat, Opening No. 4, and will ask you if you know when those openings were made?

A. That opening number is a gate, ain't it, Mr. Platt? [94]

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—No, it is 100 feet; it says “Opening, 100 feet” on the plat.

A. I don’t know nothing about it.

Mr. PLATT.—(Q.) You don’t know anything about Opening No. 4 and Opening No. 3, as designated there? A. I opened No. 3 myself; I opened No. 3.

Q. When did you do that?

A. Along about the 10th of June, maybe.

Q. What year? A. 1911.

Q. And, as I understand your testimony, you made that opening upon instructions given you by Mr. Petrie?

A. Well, instructions given to me by Mr. Petrie from Mr. Kent.

Q. How about Mr. Petrie, you had turned over the duties of your particular office?

A. I had not at that time.

Q. Was Mr. Petrie at that time employed by the company? A. I don’t know.

Q. Oh, you don’t know? A. I do not.

Mr. LEWERS.—I submit, that has been asked and answered several times.

Mr. PLATT.—I am endeavoring to get the facts.

A. Well, you are getting the facts just as they are.

The COURT.—Don’t argue. It seems to me that is pretty thoroughly understood, that he was in control himself, up to the first of July, were you not?

A. Yes.

The COURT.—And whatever he did then in obedience to what Mr. Petrie told him, was because he deferred to Mr. Petrie as the future manager of the

(Testimony of Drury P. Osborne.)

company, and if there was new work to be done, that he carried out his wishes.

Mr. PLATT.—If your Honor gets that view of the testimony, I do not desire to probe the witness any further.

The COURT.—That is what I understand, and I think that is about the fact, is it not?

A. How is that, Judge? [95]

The COURT.—Well, never mind, we will read the testimony.

Mr. PLATT.—(Q.) Do you know anything about Opening No. 6 and Opening No. 7, Opening No. 8, Opening No. 5, and an opening designated without a number, but showing in red “300 opening at Nelson’s new fence line”?

A. Yes, sir.

Q. Do you know when those openings were made?

A. Well, approximately, yes.

Q. Well when, approximately?

A. Well, what one do you want to know, Mr. Platt, first?

Q. Well, Opening No. 8, down here near Ivanhoe Creek.

A. Well that was right along the first of June maybe, about the same time, a day or two maybe one way or the other; I don’t know which one was first, the one on Rock Creek or Willow Creek, right along the same time.

Q. Who was in charge of the men who made that opening?

A. I can answer that question just the same as I did the other; that proposition was just the same as the other.

(Testimony of Drury P. Osborne.)

The COURT.—(Q.) That is, you were in charge of that work up to the first of July?

A. The first of July.

Mr. PLATT.—(Q.) Then to facilitate the hearing, the last mentioned openings to which I have called your attention, were made in pursuance of the instructions which you had received from Mr. Petrie?

A. Oh, no, some of them wasn't; the one that you speak of first was.

Q. I guess I cannot facilitate the hearing. I will ask you another question. I will ask you whether or not the Opening No. 8 just below Ivanhoe Creek, was made pursuant to instructions which you received from Mr. Petrie?

A. It was from Mr. Kent; the orders came from Mr. Kent to Mr. Petrie, and he telephoned them over to me. [96]

The COURT.—(Q.) Do you know whether those orders came from Mr. Kent or not?

A. I do.

Mr. PLATT.—(Q.) Now, state whether or not the Opening No. 7 was made pursuant to the same instructions. A. It was not.

Q. Do you know who made that opening?

A. I do.

Q. Who did? A. I did.

Q. Do you know when the opening was made?

A. Well, the opening was made—

Q. Well, you stated some time in June, didn't you?

Mr. LEWERS.—Just let the witness answer, if you please.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—(Q.) Well, when was the Opening No. 7 made?

A. It was made about the first of April.

Q. Opening No. 7 was made you say about the first of April?

A. That is the opening in the fence, according to the way the fence is actually in existence to-day, was made about the first of April; but the opening where you have it on your fence does not exist.

Q. That is, that is your opinion?

A. I know it.

Q. I don't think it is necessary to thrash that out again. When was Opening No. 6 made, if you know?

A. On the red line or the old line?

Q. On the red line.

A. Well, that was made along in probably the latter part of March; that is, it never was made, it never was fenced up, never was fenced up.

Q. What never was fenced in?

A. The Opening No. 6 that you speak of in the red line.

Q. Do you mean to say that the red line about which I have questioned you does not represent a fence in that vicinity upon the plat?

A. You went all over that once before, and I told you. You are talking about a fence now, and you asked me a question about an opening. [97]

Q. And you answered me about a fence?

A. I didn't; you were talking about an opening, and I said there never was no fence existed across the opening.

(Testimony of Drury P. Osborne.)

Q. Oh, then, I understand you to say that the fence extended up to a point— A. Yes, sir.

Q. (Contg.) —upon the west side of the opening, and then you began the fence again upon a point on the east side of the opening?

A. No, sir, I did not. I finished the fence down one way, one gang finished the fence one way, and one the other way, consequently they would finish both of the ends at the same time.

Q. I think I understand it now. Then you ran the fence up to a point which represents the west side of the opening, and you started another fence near Nelson's fence, and ran southerly to a point, which represents the easterly side of the opening?

A. That opening was always open; that is the only way you could answer that question.

Q. In other words, you did not build a fence straight through, and tear it out again?

A. There was never no fence there, it was always an opening.

Q. You say that was built when?

A. About the latter part of March some time.

Q. When was the opening near the Nelson fence, when was that opening made, if you know?

A. It never was closed; never was no opening to be made.

Q. When was the fence shown in the red line, and apparently fencing in the gap indicated in the black, when, if you know, was that fence completed?

A. Which fence do you have reference to; the red line or the dark line?

(Testimony of Drury P. Osborne.)

Q. On the red line.

A. I think it was built the first of March, 1911.

[98]

Q. It was completed about then?

A. No, it wasn't completed, it was being under construction along the month of March.

Q. Well, when do you think that portion of the fence which closed up this gap was finished?

A. That gap never was closed, on the red lines.

Q. I repeat the question: When do you think this fence which, according to the designation upon the plat, closes up the gap represented by the black, when was that fence completed, if you know?

Mr. DENMAN.—Object to the question. The red line does not show the gap was ever closed.

Mr. PLATT.—If the Court please, it does show the closing of the gap and it shows the fence was extended further north of the gap, and there was an opening made there; as a matter of fact, it does close up the gap.

WITNESS.—I will answer that question, Judge. It never was closed, the red line, he is speaking of the red line, it never was closed.

Mr. PLATT.—If the Court please, I don't want to discuss with the witness.

The COURT.—(Q.) There was a fence built, was there not?

A. There was a fence built in the first place.

Q. Wait a moment. There was a fence built along there in which there was a gap, which you say never was closed?

(Testimony of Drury P. Osborne.)

A. There was a fence built there, designating the red line that shows a gap, that never was closed.

Q. When was that fence built?

A. That fence was built the month of March, 1911.

Q. Tell as near as you can when it was finished.

A. Well, that fence, that continuous fence, down to this gap No. 6 that he speaks of, we commenced at the jog; that fence up to that gap was probably finished the 10th or 12th of March, up to that gap on the [99] red lines, but the fence down the other way, somewheres in the month of March—oh, down the other way it wasn't March, March or April, the best I can recollect.

Mr. PLATT.—It is after 4 o'clock, but there is just one other question.

The COURT.—I would like you to get through with this subject.

Mr. PLATT.—(Q.) I call your attention to what purports to be a designation of a fence in red, beginning at the Nelson fence, and running in a northerly direction to an arrow point, and will ask you if you know who built that fence?

Mr. DENMAN.—He has testified to that already, and said that he did not know.

Mr. PLATT.—(Q.) You say you don't know?

A. I do not.

Q. As I understand it then, that portion of the fence was not built during the time you were in the employ of the Golconda Cattle Company? A. No.

Mr. PLATT.—I think that is all for the present.

(Court adjourns until Thursday, March 7th, 1912,

(Testimony of Drury P. Osborne.)

at 10 o'clock A. M.) [100]

Thursday, March 7th, 1912, 10 A. M.

DRURY P. OSBORNE, direct examination continued.

Mr. PLATT.—(Q.) Mr. Osborne, do you know how many head of sheep, cattle, or other stock, the Golconda Cattle Company herded, grazed or fed upon any of the lands within the so-called inclosure as shown upon the map, in the year 1910?

Mr. DENMAN.—Object to that on the ground there has been no fencing shown to have existed prior to the month of September, 1910, and this question covers that whole year.

Mr. PLATT.—I think it may be modified to that extent. I withdraw the question, if the Court please. I don't care anything as to the amount of stock grazed prior to any of the times involved in the complaint, that is, for the purposes of this examination. I withdraw the question.

Q. Can you state how many head of sheep, cattle, horses, or stock the Golconda Cattle Company herded, grazed or fed within the fence upon this plat represented in the black?

Mr. LEWERS.—Just a moment. Of course it is understood that all of this is subject to our general objection that it is not within the issues raised in the pleadings. I would like to have that understood so as not to interrupt at all times.

Mr. DENMAN.—We further object on the ground it is incompetent, irrelevant and immaterial, as a large portion of that land inside the fences belonged

(Testimony of Drury P. Osborne.)

to us, and we had a perfect right to graze.

Mr. PLATT.—So far as that is concerned, it can do the defendant no harm for this witness to testify as to stock-grazing upon the lands of the company; and it is certainly a proper question as a preliminary question. [101]

The COURT.—You may go on subject to the objection.

Mr. LEWERS.—And it is understood it is subject to the exception as well?

The COURT.—Is this confined to the time subsequent to the dates mentioned in the pleadings?

Mr. PLATT.—It is confined, if the Court please, to the time after the construction of the co-called fence represented upon the plat in the black, and before the construction of any part or portion of the fences represented on the plat in red.

Mr. DENMAN.—We raise the further objection, then, that under no theory of the case can it be considered an inclosure. Of course your Honor will consider that later on.

The COURT.—That is the important question, as to whether it is an inclosure or not; that is the question in the case.

Mr. DENMAN.—So we object on the ground, so far as this fence is concerned, with these wide openings here, there cannot be any question as to whether that first alleged inclosure is an inclosure.

Mr. PLATT.—I submit there would be no use at all for this testimony, or any testimony, if we had satisfied the Court at this time that this was an inclosure.

(Testimony of Drury P. Osborne.)

I take it that the purpose and object of this testimony is to bring forth certain facts, in an effort to aid the Court in arriving at a correct conclusion as to whether it is an inclosure.

The COURT.—You may proceed.

Mr. DENMAN.—We note an exception.

Mr. PLATT.—Will you read the question.

(The Reporter reads the question.)

A. None, only travelling through with the sheep; no cattle or horses, or anything, was herded, or anything of that kind in there. [102]

Q. Do you mean to say there were no cattle, horses, sheep, or other stock, herded, grazed, or fed upon the lands held in private ownership, and represented in the blue upon the map?

A. Well, very little down—there is a field down to the lower end of the company's land, commencing where Willow and Rock Creek joins, and we turned saddle horses and loose horses in on the company's actual field, but none on the Government land, or none above, except just travelling through back and forth, would be all.

Q. Now, travelling through back and forth, I wish you would indicate on the plat where these horses, cattle and sheep travelled through back and forth.

A. That would only be as stock went in and went out.

Q. Just a moment. Did you understand my question. I wish you would indicate upon the plat just where cattle, horses, sheep, or other stock travelled back and forth? A. Do you want that?

(Testimony of Drury P. Osborne.)

The COURT.—Yes.

A. Well, stock would come in from the Golconda side, that is, west, come in from the west, come through the land into this country here, come through that part. Now, that stock that came here, part of it would drift north to the Winters country, and part come through the lane, and drift in here; also part come in here, and drift out through this lane, and drift to the Winters side. Also stock would come in from this side, the south side, most of the stock would drift from here up to the Ivanhoe, come in here by the reservoir, and drift in; or come in and drift in through Siawappe; some drifted in through the St. John's, through what is called the Bull camp; through this country through here (indicating). There is openings in there that you haven't here. Also drift through that country to the Rock Creek and Tuscarora side. [103]

Q. As I understand it, the cattle would come through the south, in some instances, and drift in through here? A. A portion of them would.

Q. What do you mean when you say "drift in through here"?

A. Come along here for water from the low hills, drift in here to water in Willow Creek, and drift in along here; that creek is all on the outside of the company's fence.

Q. I didn't ask you where the locations of the creeks were; I want to know after the cattle got in through these openings where they got out, whether as a matter of fact, they did not drift upon any of

(Testimony of Drury P. Osborne.)

these lands represented on the white.

A. They would drift across them lands, and on through this country in them openings, and pass on to the Tuscarora country.

Q. As I understand it, they came through the gaps from the south, and drifted clear across these Government lands; is that it?

A. Some might go up here a piece, and come out again.

Q. And some might have gone clear through?

A. Yes.

Q. What year did you notice that?

A. I have noticed every year I have been there, except the first years I was there, that country was all open, both sides, of course they drifted all through that country then.

Q. In other words, when the country was all open, the cattle drifted aimlessly all over that country?

A. Just the same as they do.

Q. After it was closed up they didn't drift so much over that country, did they?

A. No, of course they could not, it stands to reason they could not.

Q. It stands to reason they could not. As I understand it, after these fences were up, there was not so much drifting of cattle over the Government land, was there? [104]

A. Never seen much difference. In the summer time, after the spring of the year, cattle were turned out; our cattle, Russell's and different ones, drifted up that way; there was as many cattle in that field

(Testimony of Drury P. Osborne.)

from that country in the spring of the year as before there was any fence around that, so far as the drifting is concerned.

Q. How many head of the Golconda Company's cattle do you remember to have seen drifting across the Government land, represented upon this plat within the so-called fence, during the year 1911?

A. Well, I could not say how many, what number; I have seen a few; I wasn't there much of 1911; you see I was just there when the cattle went through in the spring, and went up in the spring, could not say how many, or anything about it, or how many of anybody else's, as far as the exact number.

Q. Can you approximate how many head of cattle of the Golconda Cattle Company grazed upon these Government lands within this fence during the spring of 1911?

A. I believe there was 300 head of the Pitch Fork went through that country, or maybe 400 went through there in the spring of 1911.

Q. Went clear across the country?

A. Yes, and clean over to the Walker country.

Q. Did you notice any sheep during the spring of 1911 go across that country?

A. Whose sheep?

Q. Golconda Cattle Company sheep.

A. None of them.

Q. Now, Mr. Osborne, during the time that you were superintendent or foreman of the Golconda Cattle Company, from what direction generally did the cattle, sheep and other stock come, in order to get

(Testimony of Drury P. Osborne.)

within the fence, as indicated upon the plat, and to graze upon the Government land?

A. Well, the sheep principally all came from the west. [105]

Q. The sheep principally came from the west. How about the cattle?

A. The cattle, the bulk of the cattle, that is, the bulk of the cattle that drifted through that country, came from the south.

Q. Did any cattle or sheep come from the north?

A. Only in the fall.

Q. Only in the fall. And how about the east?

A. A few of Fairchild's cattle might have drifted through that side.

Q. Well, do you know whether any of Fairchild's cattle ever drifted through that side? A. I do.

Q. Where was Fairchild's ranch?

A. Fairchild's ranch was on the Tuscarora side; Fairchild's cattle runs up in this Bull Camp country.

Q. Did you ever see any of Fairchild's cattle in the inclosure? A. I have.

Q. When?

A. Not in that inclosure, because there is no inclosure, but I have saw them on that land.

Q. How do you know there is no inclosure?

A. I know it.

Q. You are giving that as your opinion?

A. No giving about it, I know it.

Q. Where did Fairchild's cattle, or by what means did Fairchild's cattle get into this so-called inclosure?

A. They came in from the Bull camp this way, on

(Testimony of Drury P. Osborne.)

from Tuscarora right down through this country, down Toejam, to the north or south fork of Hot Creek, in this country here, in the fall when the snow drove them out.

Q. Point on the plat, will you, just through what apertures they came, if you know.

A. Could come in any of those points, through any any time, up to the spring.

Q. Let us have this: They would come through an opening represented on the plat as opening number blank, 300 at Nelson's fence line they would come through that opening, would they? [106]

A. Could come through it.

Q. Ever seen any?

A. I have not been up in this country here since that spring, but before that I have gathered Fairchild's cattle in this country, and took them to the Squaw Valley Ranch.

Q. Across this Government land? A. Yes.

Q. And you are sure that you yourself gathered them, and took them across the Government land through this opening?

A. Not from that opening, the opening wasn't through here.

Q. From the point indicated by this opening upon the plat? Is that true? A. Yes.

Mr. DENMAN.—In order that I may understand your contention, you don't claim you have shown that this fence here existed at any time prior to the filing of your bill?

Mr. PLATT.—Oh, no. But my effort is, if the

(Testimony of Drury P. Osborne.)

Court please, to find the point of access, if I can, by Fairchild's cattle upon these lands represented in the white; and, as I understand it, Mr. Osborne, the point of access to these Government lands was at the point which you have indicated here, namely opening number blank?

A. The point would be a locality here (indicates); this country in here, I know that country; this here is where they would come down in the fall, off the high mountains, find them all around here, and down here; I have taken "25" cattle, Pitch Fork and Fairchild's cattle out of there in the winter, out of two feet of snow, and taken them down on the trail, almost to Spring Valley to that point where the quaking asp is; that is why I say I have taken cattle out of that.

Q. They came out of the high mountains; what high mountains did they come out of?

A. Some pretty high mountains back here about 8 miles, about 8 miles from this point (indicates), 6 to 8 miles, back in here is some pretty high mountains, just before you break down to Tuscarora. [107]

Q. They came from high mountains, northeast in some high mountains, and came down around in the neighborhood or locality of this point indicated in the red?

A. They might have come 25 miles north from the same point the same way.

Q. I don't care anything about suppositions. You stated definitely that the stock and cattle came from a point 7 or 8 miles northeast of this plat, from some

(Testimony of Drury P. Osborne.)

high mountains, down and around to a point in the locality of this red point which I have indicated.

Mr. DENMAN.—I object to that on the ground it does not state the witness' statement. The witness stated they came through here (indicates), and ran his pointer over Toejam Mountain, and all through this side of the alleged inclosure.

Mr. PLATT.—I will leave it to the witness and to the Court.

The COURT.—It is simply what the witness states. Your repetition must depend upon just the language of the witness. Now, if there is any uncertainty about it, we will have Mr. Osborne go over that again. Now, I will tell you what I want; you are very frank, and give a great deal of information, but I want you to confine yourself exactly to the question; don't answer anything more, don't tell what you did or did not do, or what you thought; but simply tell where the cattle came into this so-called inclosure from the east. Now, if you can go there on the map and show, do so. Just name the points.

A. This particular question, to answer that particular question, I answered it once before, that I had taken cattle that had come out of the mountains up in this country; I had taken—

The COURT.—Wait a moment. You are telling a lot of matter that we don't want. All I want to know is the place in the fence now. If I ask you where you came into this house, you say [108] you came in through the door down in front; you don't tell that you came through the postoffice, or

(Testimony of Drury P. Osborne.)

what you did this morning. Just tell the particular point that you came in. If you can tell where the cattle came in on the east side of that inclosure onto that land between Willow Creek and Rock Creek, do so.

A. I could not tell you; I found the cattle at this point right in here, taking them out.

Mr. PLATT.—(Q.) What point?

A. From this point (indicating), point right there, out into the Squaw Valley Ranch.

Q. You took the cattle from the point—in order that the record might show it—from the point indicated by a red arrow mark, extending out of a designation upon the plat, “Opening No. 300 opening at Nelson’s new fence line,” do I correctly indicate the point?

A. Well, yes, now I will explain.

Q. You have not been asked a question, but you may explain.

The COURT.—If that is the only point that is an answer to the question. If there are other places where they came through, give them.

Mr. DENMAN.—Where they can come through, your Honor.

The COURT.—Or where they did come through.

A. I don’t know just hardly how to answer a question of that kind. In a stock country proposition they might come from several different localities, as far as that is concerned, where they gather in a snow-storm, or anything, cattle drift into willows.

The COURT.—We will say that is the only point

(Testimony of Drury P. Osborne.)

you know that they came through. Now, you may name points where they could come through on the east side. That don't depend on where the cattle came through, I just want to know where they could get through that territory.

A. Besides that point?

The COURT.—Yes. [109]

Mr. DENMAN.—Start at the north.

Mr. PLATT.—I object to counsel designating or telling the witness where to start from.

A. I will answer the Court. They could come through from anywhere, from right in here, anywhere from right along in here (indicates on plat), clean over to this point here, up till Nelson built his fence this spring; they can come from any of that country into this country. This is Mr. Noble's field here (indicates). Now, that fence is down, from where it comes north of Toejam, can come from any of this country, down through here, any time of the year.

The COURT.—Take your pencil and just mark the point on the east, and then the point on the west. Put it down definitely. You say this country here, and that country there, that don't mean anything. Put the place down so it shows definitely.

A. Where they can come in?

The COURT.—Yes, where they can come in. (Witness marks on plat.) Now, put a mark around there so we will know just what you mean. (Witness marks on plat.)

The COURT.—That don't answer the question

(Testimony of Drury P. Osborne.)

exactly. Here is a long fence line (illustrating on blackboard); along the east boundary, you say from here to here, and here to here, I don't know what you mean. Now, there must be a place here that is opening; it is an opening from there, say, to there; there is a place 150 feet through which they could come; now perhaps there is another place along here, it may be two miles, that they could come through. You see what I mean?

A. This represents a fence?

Q. You say it represents a fence, I don't know what it represents. Here is the side of this territory here, some of it is fenced and some is not. Now there are places here according to your [110] statement, where they can enter, there are places probably where they cannot enter. Now, I wish you would simply show us where those places are, and how long they are, if you can.

A. Well, I don't know the distance. I know that distance.

Q. What was that? A. Three hundred feet.

Q. Is there a distance there 300 feet?

A. I suppose there is, that is my orders.

Q. Well, here is a place 300 feet. Now is there any other place?

A. Well, the last time I was in this country here to know anything about it, there was something like two miles.

Q. Two miles right in here (indicating)?

A. Yes.

Q. Now is there any place right here (indicates)?

(Testimony of Drury P. Osborne.)

A. No.

Q. Just those two places, one 300 feet, and one two miles? A. Yes.

Q. Is there anything else?

A. Not anything more.

Q. Anything down here (indicating)?

A. Down here there is a half a mile.

Q. Right about here (indicates)?

A. Right about that point.

Q. Now is there anything along here, any opening? A. One right here (indicates).

Q. How much is that?

A. It is 100 feet in length.

Q. Is there anything else?

A. One right here (indicates).

Q. How much is that?

A. I suppose that would be about 300 feet, might not be that.

Q. 100 or 300? A. 100.

Q. Where is the next one? A. The lane.

Q. How much is that?

A. Well, that is probably 150 foot, on the average.

Q. Do you mean the width of the lane or the opening in the fence?

A. This is the field here (indicating), there is a lane right through here, this may be 150 foot at this point, and over at [111] this end might not be 100 or 200, and in the middle be 400.

Mr. PLATT.—I don't want to re-examine the witness on this point again. I just want to call your Honor's attention to one thing. Many of these open-

(Testimony of Drury P. Osborne.)

ings, you will understand, were made after the complaint in this case was filed, so of course they would have no direct bearing.

The COURT.—(Q.) Where is the next one?

A. The next one is here (indicating).

Q. How much is that? A. About 100 feet.

Q. Where is the next one?

A. This one (pointing), the last I knew anything of that—I see they have it marked 100 feet—it was a gate the last I knew of it.

Q. About how wide? A. A four-foot gate.

Q. Where is the next one?

A. The next one is right in this—right here (indicating).

Q. How much was that? A. Probably 500 feet.

Q. What was the next one?

A. Well, that is all I remember of at the present time.

Q. Now, you gave this 300 foot opening; is that the end of Nelson's fence?

A. That is from the company's fence to Nelson's fence, an opening between the two; Nelson's fence is here, and that lays up there, and that is 300 feet there.

Q. That is marked opening blank. That is where the 300 feet is?

Mr. PLATT.—Mark it "A," if the Court please.

The COURT.—(Q.) At Opening No. A, 300 feet. Then Opening No. 6, one-half mile. At Opening No. 7, 100 feet; Opening No. 8, 100 feet. Opening No. 1, 100 feet. Opening No. 3, 100 feet. Opening No. 4,

(Testimony of Drury P. Osborne.)

a gate, 24 feet. Opening No.—there is no number to this one, either. I will mark that B. At Opening “B,” 500 feet. Opening No. 5.— [112]

A. The last time I knew anything about 5, it was about two miles.

Q. Two miles.

The COURT.—Those pencil marks can be erased, if you wish. (Referring to points marked by the Court on the plat.)

Mr. PLATT.—(Q.) You say you were never up in that country indicated upon the plat as the “Toe-jam Mountain”?

A. Never up there?

Q. Yes. A. Been there a thousand times.

Q. You have been there a thousand times?

A. Yes, I expect I have been there a thousand times.

Q. Oh, you have been all over this country, then?

A. I know it just as a book.

Q. What did you mean when you said you had not been up there?

Mr. LEWERS.—If the Court please, I submit the witness did not say that.

Mr. PLATT.—Well, I am trying to find out.

A. I have not been there since Mr. Nelson built his fence, that is what I told the Court.

Q. When did Mr. Nelson build that fence?

A. I don't know when Mr. Nelson built that fence; I have heard Mr. Nelson built that fence, but since that fence has been there I have never saw the fence; I don't know that he built it, naturally supposed that he built it.

(Testimony of Drury P. Osborne.)

Q. Now, can you tell me what the distance is from the southwest quarter of section 5, township 40 north, range 49 east, across the company's land diagonally, in a straight line, northeast, up to the base of the Toejam Mountain?

Mr. DENMAN.—Object to that question on the ground it is not shown to be the company's land.

Mr. PLATT.—I thought it was admitted in this case, if the [113] Court please, that all the lands in blue belonged in private ownership to the Golconda Cattle Company?

Mr. DENMAN.—No, nothing of the kind.

The COURT.—No, he admitted it was private land, but did not admit it was all company land. Is that correct?

Mr. LEWERS.—Nelson owns land up in there, you know.

Mr. PLATT.—(Q.) I wish you would designate upon the plat, if you know, the land owned and held in private ownership by the Golconda Cattle Company. A. I could not.

Q. Why can't you?

A. Well, because I don't know the numbers of all their land.

Q. Do you know any of them?

A. I don't know as I could tell you any numbers of them; I knew the locality of some land; I knew the land down in Squaw Valley Ranch, and around the dam. Now, up in that country where you speak of, the company has most of the land, and Nelson has land, and different ones has land; several differ-

(Testimony of Drury P. Osborne.)

ent ones, Noble and Smith, and Alex Boram has lands, several different owners has land.

Q. But you did testify on yesterday, didn't you, that the company maintained and controlled, and, as I understood you to say, built the fence, beginning from a point upon North's fence, running clear around this so-called inclosure, up to and including a point at Nelson's fence?

A. They own that land with that fence around it.

Q. They own that fence?

A. They own the land where that fence runs.

Q. They own all the land where that fence is?

A. Where that fence crosses.

Q. There is no question about that, is there?

A. To the best of my knowledge of my field-notes and my orders, that they own every foot of that land.

[114]

Q. When was the last time that you saw any cattle come through the enclosure represented on the map as "Opening No. 5 North's fence to Noble's fence 1 $\frac{1}{4}$ miles"?

A. March, 1911.

Q. March, 1911. Whose cattle were they?

A. They was Pitchfork cattle.

Q. What do you mean by "Pitchfork cattle"?

A. Golconda cattle.

Q. Golconda Cattle Company cattle?

A. Golconda cattle.

Q. Were they being driven over?

A. They was beef stock, gathered stuff.

Q. Gathered stuff. Do you know from what point or from what direction they came?

A. Yes.

(Testimony of Drury P. Osborne.)

Q. Where?

A. The Walker place on Rock Creek.

Q. Where is the Walker place on Rock Creek?

A. It is not on that map.

Q. In what direction is it? A. North.

Q. Point it out relatively, the direction, will you?

A. Well, it would be east of north of that No. 5 opening.

Q. Cannot you designate upon the blackboard relatively, with your finger, about where? A. Yes.

Q. I wish you would do so.

A. The Walker place would be in the locality about there (indicating).

Q. Where I have marked a cross?

A. Yes, in that locality.

Q. Now, in what direction did the cattle come?

A. Well, they came south with gathered beef, that is higher.

Q. I wish you would explain from the map just where you brought the cattle through, if you know.

A. Well, there was cattle brought through two or three different points, as far as that is concerned.

Q. Well, if there are a dozen points, will you please point them out on the map. [115]

A. I cannot point out the spot or what 40 they came through.

Q. Can you point out approximately where they came through? A. Yes.

Q. I wish you would. A. Through opening No. 5.

Q. Can't you come a distance less than a mile and a quarter? A. I might not.

(Testimony of Drury P. Osborne.)

Q. If they came diagonally in a southwesterly direction, in the manner in which I am indicating upon the blackboard and map, they would come through the aperture, wouldn't they, between the Toejam Mountain and the line representing a section line?

A. The Toejam Mountain, I don't see any Toejam Mountain that looks like Toejam Mountain on there.

Q. I wish you would answer my question.

Mr. DENMAN.—That is a fair answer.

A. I brought them through that locality of opening No. 5.

The COURT.—Could you tell—

A. We brought them through—

The COURT.—Wait a moment. Could you tell with reference to Toejam Mountain where you brought them?

A. We brought them on the north slope of Toejam Mountain. What you have as Toejam Mountain, that is that big mountain up in there, but we brought them on the north slope of that big mountain.

Mr. PLATT.—(Q.) How far down the slope did you herd them?

A. I could not answer that question.

Q. Why not?

A. Because I didn't pay enough attention when driving cattle through any country to see just what part of the mountain I am on.

Q. As a matter of fact, don't you know cattle were driven over the side of the slope which was the least steep? A. No.

Q. Do you know, as a matter of fact, that they

(Testimony of Drury P. Osborne.)

were driven right over the summit of the mountain?

A. No. [116]

Q. They were not? A. No.

Q. How do you know that?

A. I told you we drove them over the north slope.

Q. How far down the north slope?

A. That I could not state.

Q. You don't know? A. No.

Q. What time before that time did you ever see any cattle come in from the same direction about which you have testified?

A. Oh, we rodeoed up in that country in 1910, we drove a lot of cattle, and came back through that country, all through that country, as far as that is concerned, north, east and west.

Q. Whose cattle?

A. Whose cattle? That is a hard question to answer. There was a dozen different men's cattle.

Q. Did you herd them? A. I did not.

Q. Who brought them down through there?

A. The rodeo outfit.

Q. What outfit was that?

A. Spanish Ranch, "25," Pitchfork, "S. L.," Hammond's, Desmond's.

Q. Where did they come through there?

A. They came through all that country up there.

Q. What country?

A. All that northern country, drive through anywhere up in that country, and shove them down to the flats.

Q. Were you there when they were driven

(Testimony of Drury P. Osborne.)

through? A. I was not.

Q. How far away were you?

A. I met them probably 6 or 7 miles from there.

Q. Point on the map, will you, about where you met them.

A. Oh, I met them just above the Tuscarora road, where it crosses into Willow Creek from Rock Creek.

Q. I wish you would indicate on the plat where you met them. (Witness indicates point on plat.)

Q. In section 26?

A. Or in section 36, could not say. [117]

Q. You might have met them in section 36 of township 39 north, range 48 east?

A. I pointed to where, about, I met them, now, you can figure out the section yourself.

Q. That is about where you met them?

A. Where I pointed.

Q. And is that the first point you met them?

A. That day, probably, it was.

Q. Now, how do you know positively that those cattle came over the Toejam Mountain, or from that vicinity? A. How do I know?

Q. Yes.

A. Because they bring them that way every year; that is the trails.

Q. How do you know that?

A. I know because my men working for me told me, and I know where they was rodeoing, and there is no "how" about it; I know which way they bring them every year, so there was nothing to it.

Q. How do you know they bring them that way

(Testimony of Drury P. Osborne.)

every year; did you ever see them? A. Yes.

Q. Where did you ever see them?

A. I was with them.

Q. How long ago?

A. 3 or 4 years ago, the first fall I was with the company; I was up in that country when they brought cattle through.

Q. Were all these fences up at that time?

A. No.

Q. They were not, were they? A. No.

Q. Well, as a matter of fact, Mr. Osborne, you were miles away from the Toejam Mountain, weren't you, when you first saw these people whom you said drive their cattle through that opening?

A. Well, I know where they came.

Q. You have heard my question?

A. I was at that time, yes.

The COURT.—Read the question.

(The reporter reads the question.)

A. Yes. [118]

Mr. PLATT.—(Q.) Are you familiar with any fences owned and controlled and maintained by the Golconda Cattle Company, which at any time were built along the boundary line of the land marked in blue, which boundary line is next or nearest the Government land represented in the white? A. Yes.

Q. I wish you would indicate on the plat where those fences, are, if there are any?

A. This fence here (indicating).

Q. Just a moment. You say "this fence here," you mean the fence which is indicated upon the plat

(Testimony of Drury P. Osborne.)

beginning at the intersection of what is known as North's fence, running in a westerly direction up to a point upon the east side line of the northeast quarter of section 34; is that true?

A. This is supposed—

Q. I don't care about suppositions.

A. The way I want to answer the question is this, if the Court please. I don't know who owns these five 40's south of the fence; it may be Government land; I don't know who owns those five 40's along there, maybe six 40's,—say five 40's—I don't know who owns them. That is all the fence I know of, except on the inside. You mean on the inside, don't you, not on the outside?

Q. I mean on the inside, yes, not on the outside.

A. That is all I know of that actually touches Government land; if that is Government land, it runs along the line of the Government land.

Q. Now, do you know who owns the land indicated in the blue, just north of the fence line, which you have just indicated? A. Yes.

Q. Who owns that?

A. Golconda Cattle Company.

Q. You are sure about that? A. Yes, sir.

Q. Now, as a matter of fact, Mr. Osborne, when was this line [119] of fence about which you have just testified, run along here?

A. Well, it was posts set in 1909.

Q. Posts were set in 1909. Where did it used to run? A. It used to run right there.

Q. Did it always run there?

(Testimony of Drury P. Osborne.)

A. Always run there.

Q. All the time? A. Yes.

Q. Prior to 1909?

A. Oh, no, the posts was set in 1909, the wire wasn't put up until 1910.

Q. Was there any fence there prior to 1909 at all?

A. No.

Q. Now, as I understand it, that is the only fence owned and controlled by the Golconda Cattle Company, or line of fence, which is situated next to the Government land?

Mr. DENMAN.—On the inside?

Mr. PLATT.—Of course.

A. Well, unless it would be this new fence I built this spring, I don't know who owns this land at all; I know the company owns all the land below that new fence; now, this land, I don't know who owns that; that is the piece that comes through the lane out here, and then out here, and across Willow Creek. If this is Government land, that is the fence; outside of that new fence there crossing there, I know of no other that touches Government land.

Q. You mean outside of the fence indicated in red upon the plat, beginning at opening No. 1, and ending at opening No. 8.

A. Yes, that fence was built this spring, in 1911, from this point out to that point, 33 down to 4, through 4, and across to 2, across Willow Creek, and joined another fence.

The COURT.—(Q.) That is the fence from point No. 1 to opening No. 8?

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—8 in red ink.

Mr. PLATT.—(Q.) Now, Mr. Osborne, do you know of any land whatsoever indicated in the blue upon the plat, and held in private [120] ownership, which is completely inclosed by a fence?

A. Yes.

Q. I wish you would indicate it.

A. Right here (pointing).

Q. Now, you say land in section 28.

A. Now, I am speaking, Judge, of what I know. I built this fence in the spring, came across here and came up here, the surveyor set all these stakes to this point, just before the first of July they was stretching this fence, and I left the first of July; I have never saw that since that, whether they completed this fence from this on up or not, but when I left there the calculation was to go right on. This part I know is fenced because I run the fence across up to this field when I left. Now, whether the Golconda Cattle Company has completed that fence to here, I don't know.

Q. Then the only complete inclosure of Golconda Cattle Company land about which you know anything, is that land near the so-called reservoir, as indicated upon the plat, and beginning at a point approximately in section 29—

A. No.

Q. Where does it begin? A. At this lane.

Q. Beginning at a point in section 28?

A. I think probably it did.

Q. Approximately section 28, and ending at what point?

(Testimony of Drury P. Osborne.)

A. Well, my survey, I had Mr. Taylor survey, my point commenced here; they was constructing this fence when I left the Golconda Cattle Company.

Q. You were engaged in constructing that fence, and it was your intention to run it to a point somewhere in section 36?

The COURT.—(Q.) That includes the reservoir, does it not, the one you are speaking of?

Mr. PLATT.—Yes.

Q. Now, I wish you would point out and indicate any other lands of the Golconda Cattle Company that are completely inclosed. [121]

A. Here (indicating on plat).

Q. That country represented upon the plat as being inclosed by a fence indicated in the red, running from Opening No. 1 to Opening No. 8, and joining at each opening with the fence represented as being on the outside of the lands represented in the blue; is that true? A. That is a field.

Q. Then you have two fields.

The COURT.—(Q.) Is that outside?

A. That is all under cultivation down below.

Q. Is the fence represented there as being on Government land? A. No, sir, on company land.

Mr. PLATT.—The fence is represented as being on the outside boundary of the lands indicated in blue, and held in private ownership. (Q.) Now, what other?

A. We had a field in Toejam Creek, about 120 acres or 100 acres; something like that; I came down here and ran down the creek, and ran across that

(Testimony of Drury P. Osborne.)

field I sowed in barley and potatoes.

Q. Then the only other inclosed field is a field of about 120 acres in the south half of section 33 of township 40 north, range 48 east?

A. Well, from that map—I could not say whether that is the exact 40's, it is in that locality.

Q. That is approximately, then, in your judgment, the location of that other field? A. Yes.

Q. Now, you are sure that those are the only three fields belonging to the Golconda Cattle Company indicated on the plat in the blue, that are completely inclosed by fences?

A. Well, yes, up to the time I left.

Q. And whatever other fences there are upon the plat around lands indicated in the blue, or owned by the Golconda Cattle Company, are just around one side of those lands? [122]

A. Yes. That is lands now that is owned by the Golconda Cattle Company; that is the way the question was, wasn't it?

Mr. DENMAN.—Yes.

Mr. PLATT.—I think that is all, if the Court please, for the present.

Cross-examination.

Mr. DENMAN.—(Q.) Mr. Osborne, you were asked on your direct—

The COURT.—Before you go on, in order that you may govern your cross-examination, if you see fit to, I think I shall allow you to discuss this question of accounting, and so on, before very much more testimony on that point comes in. I am afraid that is

(Testimony of Drury P. Osborne.)

going to occupy a good deal of time. If I was certain it would occupy only a very short time, I would adhere to the present rule allowing it all to go in and have that discussed at the end of the case, and I would prefer to have it that way, unless it is to occupy too much time. You can do just as you prefer.

Mr. DENMAN.—I see, your Honor. We will take up our examination of this witness, and then at 2 o'clock have that matter put down for argument.

The COURT.—You may as well finish this day. Do just as you like. If it is going to occupy two or three days to put that in, or a day or so, it is quite a saving.

Mr. DENMAN.—Of course our understanding is that an accounting is something to be referred to a Master. I think that is the usual procedure; of course, it is within the discretion of the Court.

The COURT.—I will hear you on that matter before very much more testimony is put in on that point. [123]

Mr. DENMAN.—(Q.) Now, Mr. Osborne, on your direct examination the Government asked you about your superintendency there, and I want to ask you some particulars regarding that. Who was the president of the Company?

A. Well, Mr. Kent was supposed to be.

Q. That is the man you refer to as Congressman Kent? A. Yes.

Q. And did you receive your orders from him, I mean in general? A. In general, yes.

(Testimony of Drury P. Osborne.)

Q. Is it not a fact that Congressman Kent ordered you to at no time inclose any Government land?

A. That is the fact.

Q. Is it not a fact—

Mr. PLATT.—I object on the ground it is improper cross-examination.

Mr. DENMAN.—You in direct examination tried to prove the relationship of this man to this corporation; I want to show what his agency was, what his orders were; what the entire relationship was between him and the corporation.

Mr. PLATT.—I think counsel has evidently forgotten as to just exactly what happened during that examination. The witness testified in response to my questions that he did not receive instructions direct from Congressman Kent, but that he was shown a telegram—

Mr. DENMAN.—I am not referring to that.

Mr. PLATT.—I am referring to his testimony upon that point. That he was shown a telegram, which, as I understood him, was sent to a Mr. Petrie from Congressman Kent, and that pursuant to that telegram, he went along and did certain things. Now, if the Court please, upon that statement made by the witness, the question was either withdrawn, or the objection interposed by counsel was sustained, upon the ground that what Congressman Kent told Mr. Petrie, and what Mr. Petrie told Mr. Osborne, was hearsay [124] testimony.

Mr. DENMAN.—That is not the point I am making, your Honor. The point I am making is this;

(Testimony of Drury P. Osborne.)

that this man on direct examination was examined as to his relationship with the corporation, and the authority he had to build these fences. Now, on cross-examination I want to go into the question of the authority he received, the nature of his agency, and in usual cross-examination method find out what his relationship was to the corporation. I surely can do that.

The COURT.—There is no doubt about your doing that. But you asked a leading question, if I recollect right as to whether Mr. Kent himself had ever authorized him to build a fence, and what his orders were about building fences on Government land?

Mr. DENMAN.—Yes.

The COURT.—Now, as I look at it, it is more a question of what he did, than what the orders were. I don't think that merely because the orders were not to put any fence on Government land, and not to make any enclosure of Government land, that I am bound to accept their interpretation of what means an inclosure. Now, there is going to be a very decided difference between counsel as to what an inclosure is, and even if they ordered these men not to put the fence on, and not to inclose this land, if, in spite of the orders the land was inclosed, and the company has allowed it to remain there, and it is a violation of the law, it strikes me it is a very serious thing, even if it was done contrary to orders originally. But you are at liberty to go into this cross-examination to ascertain what his relations

(Testimony of Drury P. Osborne.)

were to the company, but when it comes to exonerating Mr. Kent, if you go into it for that purpose, it seems to me that is a part of your defense. [125]

Mr. DENMAN.—Let me see if I make myself clear.

The COURT.—The witness was not asked, as I recollect it, whether Mr. Kent had directed him not to fence public land or not, he was simply asked as to whether he had received instructions, and where he had received his instructions as to the construction of certain fences.

Mr. DENMAN.—Certain openings.

The COURT.—Is that not a fact?

Mr. DENMAN.—On that end of the case I did not have that in mind at all. What I have in mind is this, that where testimony is offered on behalf of the Government to show intent, and that was their intention in offering certain evidence, that we can show the intent of the corporation by the statements of its leading officers, and if we can check that down right through, from the leading officers down to the lowest of the employees, we have shown the corporation intent. Now, we did not offer the evidence as to intent; our opponents have; they have offered considerable evidence to show intent. And, furthermore, in showing the relationship of this man—

The COURT.—Before you go onto something else, the relationship is all right, you need not argue that. What testimony do you point to as showing Mr. Kent's intent?

Mr. DENMAN.—No, the company's intent.

The COURT.—What do you show then with refer-

(Testimony of Drury P. Osborne.)

ence to the company's intent; what particular testimony there do you point to as showing that?

Mr. DENMAN.—The question of the exclusive occupancy of the interior of that land. Mr. Platt said there was a respectable line of cases supporting it.

The COURT.—Whatever he said as to the occupancy. Now, what testimony as to the other. This is as to the construction of [126] fences, the purport of your question that was objected to.

Mr. DENMAN.—Well, I should say that the construction of the fences would indicate what purpose the interior was to be used for, the space in between, I should think that would all bear on the matter.

The COURT.—The mere fact that he has asked questions as to the construction of a fence opens the door for you to introduce testimony as to what instructions the president of the company gave?

Mr. DENMAN.—Yes. It may be that the man may have gone outside of his authority. We don't know until we have cross-examined. It may be a frolic of his own.

The COURT.—Well, I think I will let you go into it. But the question as it is raised, I will allow other examination by the Government of the witnesses on that point, if they wish, as new matter brought out on cross-examination.

Mr. PLATT.—Your Honor will give me the benefit of an exception on the grounds stated in the objection.

The COURT.—I allow it simply because it is a

(Testimony of Drury P. Osborne.)

matter which is relevant at some stage in the case, and they can introduce that as a matter of defense. I don't think there is very much doubt about that, if the intent cuts any figure at all in the case, and that will be one of the questions to be argued.

Mr. PLATT.—I would like to hear that question read.

(The reporter reads the question.)

Mr. PLATT.—In order that the record may be straight, I move that the answer be stricken out for the reason I did not have an opportunity to object before the answer was in.

Mr. DENMAN.—We will consent that the objection appears before the answer. [127]

Mr. PLATT.—Upon the ground it is improper cross-examination, and the further ground it does not tend to prove any issue involved in the case; and upon the further ground that the instruction given by the president of the corporation without any foundation laid as to the source of the authority of the president of the corporation to give instructions, could in no wise bind the corporation, or could in no wise be testimony relevant to any issues involved between a corporate entity and the Government of the United States.

Mr. DENMAN.—This is preliminary; we will make the connecting link between Mr. Kent and the corporation, although I should think Mr. Platt would be willing to concede that to be a fact.

Mr. PLATT.—Concede what to be a fact.

(Testimony of Drury P. Osborne.)

Mr. LEWERS.—Mr. Kent's presidency of the company.

Mr. PLATT.—I am willing to concede and know that as well as one might know from hearsay that Mr. Kent is the president of the corporation; but I am not willing to concede that the president of any company may go on the street, or go to an employee, and say, you do this or do that, and by mere oral instruction bind the corporation.

Mr. DENMAN.—That is one method of showing the intent.

Mr. PLATT.—And I should also, as long as the question is to be permitted, like to question Mr. Osborne again.

The COURT.—I shall allow you to do that.

Mr. PLATT.—For the purpose of laying the foundation for another objection as to the nature of those instructions, if they were in writing I should like to see them.

The COURT.—(Q.) Did you get those instructions in writing?

WITNESS.—Not the instructions according to building these fences, that is where the question is wrong. [128]

Q. Where did you get the instructions?

A. I got the instructions from Mr. Kent through Mr. Petrie to make these openings in constructing these fences. He asked me the question about constructing fences. He asked me where I got authority for making these openings. I got that from Mr. Petrie. And constructing these fences, I got my in-

(Testimony of Drury P. Osborne.)

structions from Mr. Kent.

Q. Did you ever have any instructions directly from Mr. Kent; that is, did he speak to you in person, or send you a letter? A. By which?

Q. About either the openings or the fence.

A. Mr. Petrie had a telegram or a letter—

Q. Just wait a moment; I don't think you understand my question. A. No, I don't.

Q. You and I are talking together; I am talking to you personally; and if I tell one of your lawyers on the street to tell you something, and he comes and tells you, I am not talking to you, it is your lawyer who is talking to you. Now, I want to know whether Mr. Kent spoke to you directly at any time about these fences? A. He did.

Q. About the openings in the fences?

A. He did.

Q. Did he ever write you a letter about it, that is, direct to you and not to Mr. Petrie, but to you, that you received yourself?

A. I ain't certain whether it was about the openings or not.

Q. Well, did he ever write you about the fence, or telegraph you?

A. He has wrote to me about the fences, and other business, all the time I was superintendent. I got lots of my orders right direct from Mr. Kent.

The COURT.—Very well.

Mr. PLATT.—I would like to see that correspondence, if the Court please, if this testimony is to be permitted, it is the best evidence. [129]

(Testimony of Drury P. Osborne.)

The COURT.—Well, the telegram or letter would be the best evidence, that is true.

Mr. DENMAN.—(Q.) Now, my question I asked you was what Mr. Kent had said to you personally?

Mr. PLATT.—I object on the ground the time of the conversation has not been designated, the date of the conversation has not been shown, and the place of the conversation has not been shown; and that the proper foundation has not been laid.

Mr. DENMAN.—This is not an impeaching question. This question, your Honor, has reference to the question of intent, of user of land, not as to fencing.

Q. Did Mr. Kent as president of the company, not instruct you to do nothing to interfere in any way with the use of that Government land by anybody else, meaning the Government land between these creeks?

Mr. PLATT.—Without repeating my objection, I desire the same objection to be interposed to this question that I have heretofore interposed to a question of like character.

A. I don't understand the question.

Mr. PLATT.—As I understand it, the objection is overruled?

The COURT.—Well, yes, the objection is overruled, and the answer goes in subject to the objection, just the same as all this testimony.

Mr. PLATT.—And your Honor will give me the benefit of an exception on the grounds stated in the objection.

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—Read the question.

(The reporter reads the question.)

The COURT.—Just the oral instruction. It has nothing to do with any letters or telegrams that you ever saw. I want to make this plain, and then if you don't understand it, ask the question. This is a conversation that occurred between you and Mr. Kent, [130] it is not anything that Mr. Petrie told you that Mr. Kent said, or that anybody else told you; it is not anything that he wrote you, simply what he told you in person when you and he were talking together.

Mr. PLATT.—I add the additional objection that the time and place has not been mentioned, so it would be impossible for the Government in cross-examination or otherwise, to meet the question, in the absence of time, place, or date of the conversation.

The COURT.—If this were an impeaching question he would be compelled under the rule to give the date and place, and the names of the persons who were present, but as I understand it, it is open to you to question him with reference to that matter as much as you like.

Mr. PLATT.—In order that your Honor may understand my position, my contention is that it is just as necessary for testimony narrating a conversation, whether it be impeaching testimony or otherwise, that the time, place and date of the conversation be indicated by the witness before the witness is permitted to testify as to the conversation itself.

(Testimony of Drury P. Osborne.)

The COURT.—That may be included as a part of the objection.

Mr. DENMAN.—Read the question.

(The reporter reads the question.)

A. Yes, the conversation was that I was to not have any, and not to claim any rights, title, or anything in or on that Government land whatever, nor to keep nobody from going in or out.

Q. Mr. Osborne, I want to ask you more particularly about these lands—and in order that your Honor may get what we have in mind, I want to make a statement of what I expect to prove by this witness.

The COURT.—Do you think that is just the proper thing before the witness. I think I will grasp your meaning. If you have [131] something you want to concede so as to shut off part of this examination, I will listen very gladly indeed.

Mr. DENMAN.—No, the situation is the other way; we desire to build up certain facts.

Q. Mr. Osborne, did you ever have any discussion with the president of the Golconda Cattle Company, or any of its officers, regarding the fencing of the lands of the company, and by that I mean all the lands owned in the vicinity of Dutton?

A. I have.

Q. When did you first have those discussions?

A. In December, 1908.

Mr. PLATT.—The same objection will go to all this line of questioning.

The COURT.—I presume you propose to bring out the orders?

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—Yes.

The COURT.—I doubt whether the mere conversations would be of very much service to the Court.

Mr. DENMAN.—It was preliminary; that was all.

Mr. LEWERS.—We expect to follow with what was done pursuant to those.

The COURT.—Orders; but it seems to me conversation is purely hearsay. If there was an order given, that is a fact.

Mr. DENMAN.—I am going to show the intent of the company from the beginning of the fencing work, which ran over a period of about five years, during which time they fenced up their fields, one after another in succession, beginning below there, and worked into this territory.

Mr. PLATT.—I assume the Court does not take that as testimony?

Mr. DENMAN.—No, I am showing what my offer of testimony is going to be, but on cross-examination bringing out what the intent of the company was.
[132]

The COURT.—Is it necessary for you to go down below there four or five miles, to show what was done on other property of the defendant company?

Mr. DENMAN.—No, not to do that, but to show the intent of the company operating in that district.

The COURT.—To show their intent by what they did with other lands?

Mr. DENMAN.—Adjoining lands, connected with those lands by water and community of interest.

The COURT.—You may state just what that is.

(Testimony of Drury P. Osborne.)

I am convinced that would hardly have much weight with me, but I would rather you would just make a brief statement of it, and see whether counsel will admit it or not. I would rather you would make a statement of what you want to prove, briefly, with reference to other lands, and submit that to counsel; and if it is consented to, it can be considered something you could prove, without putting it in evidence.

Mr. LEWERS.—I want to make a suggestion in that connection. The purpose of the cross-examination is based upon the plat, which is already in evidence, which plat, taken by itself as it there stands, gives but a partial impression from which your Honor can determine the many essential facts going towards the intent and exclusive user, and so on, contended by the Government in their bill, and which they have sought to sustain. That is, that your Honor with that plat, or with the evidence based upon that territory alone, will get a very partial and incomplete conception of the reasons why the particular fences shown on this plat were constructed. It is practically the same as showing a nose on a man's face, without showing the face as to its fitting.

The COURT.—Let me ask you a question: Suppose the Government should offer proof, showing that five miles below here you had [133] put a tight fence without a gate in it, around five thousand acres of land, would you consider that testimony admissible?

Mr. LEWERS.—If the fencing of this upper part,

(Testimony of Drury P. Osborne.)

whatever fencing was done there, and whatever was contemplated, and was in course of being carried out, had a logical bearing from the standpoint of economical ranching on that lower part, yes. That is our purpose. We do not desire to have it appear that the situation is as outlined by the Government here. This is merely a portion of a single unit; we are not going in onto other units, that is not our desire.

The COURT.—I think I shall have to confine it within the limits of cross-examination. If you want to question about any territory, the question will have to be confined to this particular territory within the limits of cross-examination, it seems to me. I don't want to have this case go on so long, that is the objection. As I told you in the beginning, I am willing to hear any testimony you offer in good faith, provided it don't take up too much time, but with 30 or 40 witnesses here, and getting along as slowly as we do, I am afraid we are going to be a month; and also that we are getting in a lot of testimony that is not going to be of very much service to the Court. I think a great deal of this testimony will not be considered when the Court comes to write up its findings or statement of facts, if it concludes to make a written decision of the case. So far, I have gathered from this that certain territory there belongs to the Government, and certain territory belongs to the defendant; a fence has been erected along in certain places; there are certain openings, and cattle have been ranging in there, some neighbors cattle and some of the defendant's cattle, and that these openings are about of a

(Testimony of Drury P. Osborne.)

certain extent, and through these openings cattle can go; [134] that is about all so far that I have learned out of this case.

Mr. LEWERS.—Your Honor, I think, will be satisfied, and I am sure that counsel on the other side will agree, that there is no reasonable probability there will be any such number of witnesses actually used as have been subpoenaed here, that is, from the assurances we have received, I think there is no question about that. In fact, on the basis of that, we have sent for a number of our witnesses to be here immediately, on the expectation that the Government's case would close within a day or two; but I will state, your Honor, that the testimony which we now seek to elicit on the cross-examination is directly connected with the direct examination, and that we in the utmost good faith do believe that it is material.

The COURT.—I do not doubt that at all.

Mr. LEWERS.—And if it is not improper, I can, by simply exhibiting a map here to your Honor, indicate what it is we are contending. (Places map on board.)

Mr. PLATT.—I submit, if the Court please, if they want to start in their defense at this time—

Mr. DENMAN.—Oh, no.

Mr. PLATT.—(Contg.) I think probably the Government might as well permit them to do it. If they desire to introduce any plats, if they are proper plats, they should be introduced on their defense; and I do not propose to discuss with your Honor, or with counsel, anything relative to a plat which is not

(Testimony of Drury P. Osborne.)

in evidence, or which is a part of their defense, at this stage of the trial.

The COURT.—I think you had better ask your question, and I will rule on it.

Mr. LEWERS.—In answer to Mr. Platt, this is not offered in evidence. It is merely to illustrate our contention to your [135] Honor, as a part of the argument to your Honor, and Mr. Platt need not be needlessly alarmed as to our offering it at this time. It is merely to show that the ranch is directly connected with the portion that is on the original plat.

Mr. DENMAN.—I see what your Honor desires, and I will endeavor to build up my case through the questions, and get a ruling.

Q. Mr. Osborne, you testified regarding this fence here, running from T. 39 north, range 47 east, down to Opening No. 1. Is that fence an isolated fence, or is it a part of an inclosure to the westerly, which inclosure is inclosed on the east side by that fence?

A. That fence is the east, and part of the north of a field of 1600 acres, company land.

Q. When was that inclosure built?

A. That was built in the spring of 1909.

The COURT.—Q. Is that the inclosure south of the Midas road?

A. Oh, no, that is the Fraser Creek country; that is up in what is called the Fraser Creek country.

Mr. DENMAN.—It is right north of the Midas road here. Sketch in, if you will, this field of which that fence I have just described is the easterly boundary.

(Testimony of Drury P. Osborne.)

A. Well, I don't know as I could just exactly.

Q. In a rough way.

A. I could give the locality of it.

Q. In a rough way. (Witness draws on plat.)

Q. How far below "Opening No. 1-150" is it?

A. Oh, that is the lane, it comes to the lane.

Q. It comes to the lane, and forms the northern boundary of the lane in there? A. Yes.

Q. Now, I understand that you have fenced that inclosure somewhere around 33, on the north boundary. A. Yes, a small field.

Q. And you say you planted in there?

A. Barley and potatoes. [136]

Q. What preparations had you made to fence the land running from T. 39 north, range 47 east, around to North's fence on the northerly side of—or around Rock Creek and Toejam Creek?

Mr. PLATT.—Object on the ground it is improper cross-examination; on the further ground that any preparations made to do anything would not be binding upon anybody, and would not be evidence.

The COURT.—I will allow that question.

Mr. PLATT.—We note an exception.

A. We have the posts and wire at the Dutton ranch to make a field of that now.

Mr. DENMAN.—(Q.) How long ago did you get that wire?

A. Bought that wire about two years ago.

The COURT.—You need not go into that any further; there was no question about that in direct examination.

(Testimony of Drury P. Osborne.)

Mr. LEWERS.—The last part of Mr. Platt's direct examination was directed to the question particularly of not having put any fences on the south side of that land, for the purpose obviously of showing that there was a particular significance to be attached to the fact that there was only one fence there; and that opens that very question.

Mr. DENMAN.—Of intent.

Mr. LEWERS.—The questions asked by Mr. Platt were undoubtedly for the purpose of showing we had no such idea in mind as making a field up there anywhere. Now, on cross-examination we are entitled to complete that story as to what actually was done.

The COURT.—Very well, proceed; I will allow it.

Mr. PLATT.—We note an exception.

Mr. DENMAN.—(Q.) The same thing is true of all the balance of the company's land on those creeks?

A. My orders was to fence the fields, from 40 to 5,000 acres of [137] the company's land, to entirely close it.

Q. These fencing operations, enclosing field after field, have gone on for the last five years, have they not?

A. Four years, while I was with the company.

Mr. PLATT.—I move that the answer be stricken out, on the ground there was no testimony in direct examination of any field operations; the questions were directed primarily to the actual fields fenced, and not as to any field operations, or contemplated operations.

Mr. DENMAN.—There is something else referred

(Testimony of Drury P. Osborne.)

to aside from the fields, and that is a state of mind as showing the intent. If the intent was to bound all the properties, we can show that covered the other as well as this.

The COURT.—I think I will sustain the objection as to future operations.

Mr. DENMAN.—As to future operations.

The COURT.—Read the last question and answer.

(The record is read by the reporter.)

Mr. PLATT.—I was going to suggest to the Court, the question itself, the fencing operations, enclosing field after field. There is no testimony showing that field after field was enclosed, or any fencing operations enclosing field after field. He was interrogated as to the physical conditions of those lands, as to the inclosures.

The COURT.—I admit that is a very general question, and the answer is very indefinite indeed, but of course they take the testimony just as it comes.

Mr. DENMAN.—Q. Tell me what the character of land is that is owned by the company along these creeks, and that you have spoken of as the company land, in answer to Mr. Platt. What is [138] the character of that land?

A. It is all rich bottom land, except a few points that run around on the hills. The bulk of the land is all rich, heavy black loam land.

Q. Is there any of that black loam bottom land that has not been taken up in there, that you know of?

A. I don't know of a piece.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Do you mean by the Golconda Cattle Company?

Mr. DENMAN.—By anybody.

WITNESS.—By anybody. There is other people.

Q. You are familiar with all that territory in there, aren't you? A. I am.

Q. You have travelled over time and again this entire district in here, haven't you? A. I have.

Q. As a matter of fact, all this land not marked in blue, is simply rough sagebrush benches, is it not?

A. Rolling country.

Q. Rough or—

A. (Intg.) Not so very rough, no, just a rolling country, like rolling hills.

Q. What can you say as to the vegetation of it?

A. Good spring vegetation, for a couple of months in the spring of the year, for lambing time, that is all; in the fall just a little dry stuff growing here and there; and that little dry stuff that is left don't amount to much.

Q. Now, with regard to the cattle you have seen in there between these creeks since October, 1910, tell me the different brands and owners that have cattle in there, to your knowledge?

A. It is pretty hard to tell all of them, rodeoing there is quite a few.

Q. I am now talking about the cattle you have seen inside there; I am not asking how they got there; I am simply asking what cattle you have seen inside in that space between those creeks, since [139] October, 1910, different brands.

(Testimony of Drury P. Osborne.)

A. Well, I have saw come through there, gathered from that country on, and rounded up in there and separated, I have seen eight different irons.

Q. That is, you saw eight different irons of cattle that were roaming within the district lying between Rock Creek, Toejam Creek, Siawappe, and Willow Creek? A. Yes.

Q. Now, you say different irons, you mean by that owned by different persons? A. Different owners.

Q. Tell me the owners?

A. Well, the "25," that is Mr. Russell. "P. Bench" "Palo Alto" is Moffatt and Humphrey. The "S. L.," John G. Taylor's. Then there is the "C. S.," the Bliss Brothers. Then there is the "T. J.," the Hammond boys. And there is a "Bar Iron," John Desmond. Fairchild's iron, I don't know what they call it; it is a kind of square block with an iron on each end of it.

Q. Is it not a rolling-pin?

A. Yes, rolling-pin; well, say the "Rolling-pin." I would not say for certain that I saw any "Y. P's" that year. There is Desmond's, "C. S.," "Pitchfork"; then there is a horseshoe.

Q. That is another one?

A. "Horseshoe" is Cop's at Battle Mountain. There might be some other, but I know they was gathered that fall, of October.

Q. How about the spring of the following year, the same brands in the country?

A. Yes; when they turned out, the same brands would drift to their ranges, just the same principally, yes.

(Testimony of Drury P. Osborne.)

Q. Let me ask you about Toejam Mountain; is that properly drawn on there?

A. Well, it don't represent Toejam Mountain at all, the way Toejam Mountain runs, at all.

Q. Does it represent anything in there that looks like it?

A. It doesn't look like Toejam Mountain. [140]

Q. As a matter of fact, Toejam Mountain runs the other way, does it not?

A. The long ridge of Toejam Mountain runs the other way.

Q. Is it not a fact there is a space for a mile or a mile and a half in there, over any portion of which you can drive cattle?

A. Ain't any portion but what you can drive over the summit of Toejam Mountain with horses and cattle.

Q. Is it not a fact, many places you could drive a wagon into this country, going on beyond?

A. A few places.

Q. How about feed in there; is it not a fact that cattle would naturally graze right through this opening, out into the country beyond?

Mr. PLATT.—Object on the ground it calls for an opinion of the witness.

The COURT.—I will allow the question.

Mr. PLATT.—I note an exception on the grounds stated in the objection.

(The Reporter reads the question.)

A. Yes.

Mr. DENMAN.—Q. What is this country beyond,

(Testimony of Drury P. Osborne.)

—is it a high, mountainous grazing country?

A. Fine grazing country.

Q. Now, tell me, what is the—of course I know this is not necessary for this Court, but it may be on beyond—what is your natural summer range,—is it in the higher rather than the lower regions?

A. Summer time it is high altitude.

Q. What is the reason for that?

A. Well, better grass, and colder; better grass, the higher up you get the better grass country you get.

Q. How about the condition of the feed?

A. That is in an open range.

Q. This is an open range in here, it is?

A. Yes. [141]

Q. How about the condition of the feed between the point marked "Opening No. A," and North's fence, running to the northeasterly from there for about five miles?

A. It is just an ordinary slope from these low hills, an ordinary mountain slope, up some steep ravines, and nothing impassable for a buggy or wagon or sheep, or cattle, or anything else to pass over it.

Q. What is the condition of the feed in that country?

A. Bunch grass and sunflowers in summer time close to the mountain, up around the rocks, rocky spaces; have a kind of a sunflower, what we call a sunflower, weeds and such things, fine feed.

Q. Cattle range right up to the summit, and through those rocks? A. Certainly.

(Testimony of Drury P. Osborne.)

Q. Now, you have referred to a two-mile space running northerly and slightly westerly from this point marked "Opening No. A," and that apparently would include North's fence?

A. Yes; in that two mile, I am alluding to that two miles as when I was there last.

Q. How long ago was that?

A. That was last spring, probably in March, the first of March.

Q. What was the condition of North's fence at that time with reference to holding cattle?

A. North's fence ain't held cattle for years.

Q. How many years?

A. Not since I have been in that Squaw Valley country, five years.

Q. Why would it not hold cattle?

A. For probably a hundred yards at a place the posts has all rotted out, and fell down.

Q. By North's fence you mean this fence running from the easterly end of the medium or middle line in section 36, township 40 north, range 48 east, running from that point across over to the point of the arrow at opening No. 5? That is what you mean by North's fence? [142]

A. I don't think North's fence runs that way according to that map; I know it don't.

Q. Whatever fence it is between those two points is the fence you refer to as having these openings in it?

A. Yes. Where have you North's fence running, Mr. Platt, what locality?

(Testimony of Drury P. Osborne.)

Mr. PLATT.—You are talking to your counsel, now, and had better answer his questions.

Mr. DENMAN.—(Q.) That is the fence that has the openings in?

A. The Noble fence has the openings, every little piece it is down.

Q. That is a very old fence, is it not? A. Yes.

The COURT.—(Q.) Do I understand that Noble's fence is the one in which both of these openings exist; that is, the two-mile opening and the half-mile opening?

WITNESS.—No, he is speaking of Noble's fence being down, it is rotted, and fell down.

Mr. DENMAN.—I will bring that out, your Honor; I am going to come right across the country here through this territory.

Mr. LEWERS.—I would like the record to show that what is referred to as Noble's and North's fence is the same fence.

Mr. DENMAN.—This North's fence is also known as Noble's fence?

A. Yes.

Q. What other name has the fence?

A. Used to be North's fence, it is now Noble's fence.

Q. What is that field called in there sometimes?

A. Noble field.

Q. Has it any other name? A. North Ranch.

Q. What is the name Mike was calling it last night? Is it ever called the Walker field?

A. No, that ain't the Walker field; the Walker field

(Testimony of Drury P. Osborne.)

is a field that is fenced on Walker Creek. [143]

Q. Above there? A. Above there.

Q. Now, coming down from a point where the Golconda Cattle Company's fence used to join North's fence at the easterly side of section 36, as I understand it, as you came through along this fence to where it ends or turns to the north again, you say it is down in many places along there?

A. Probably from where it goes down into Toejam to where the Company's fence joins it, down to the Company's land, it is probably down four places.

Q. How large are the openings?

A. Some down 300 feet, some down probably a hundred.

Q. That has been the condition how long?

A. Four years.

Q. How old is that fence, do you know?

A. Built something in 1882 or 1884, or 1879, I don't know, somewhere along there.

Q. When you come to the westerly point—

Mr. PLATT.—(Q.) How do you know those fences were built in 1882 or 1884, or 1879?

A. I know it from Noble, and people who lived in that locality.

Q. You don't know of your own knowledge, do you?

Mr. DENMAN.—I will bring it out. (Q.) Does it appear to be an old fence? A. An old fence.

Q. Rotted down? A. Places rotted down.

Q. How old would you judge it to be by its appearance? A. Well, it looks to be 20 years old.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Appearance and knowledge, if the Court please, are two different things.

The COURT.—Well, it will go in that it is an old fence.

Mr. DENMAN.—(Q.) Now, at the westerly point of the arrow at opening No. 5, coming across to this opening marked “A,” there has never been to your knowledge any obstruction built by anybody [144] to your knowledge, between those two points, or lying to the north easterly from there?

A. None whatever.

Q. Now, what can you say as to the territory where you have drawn these pencil lines running into this territory in the interior here, between opening No. “A” and the west end of opening No. 5, as to passability for cattle? A. It is all right.

Q. And each one of these pencil lines represents approximately where cattle could freely come through? A. Could come through any place.

Q. Now, I want to ask you about the character of the country where you made this opening of half a mile here. A. That is on the Willow Creek.

Q. Is there any creek leading into that at the point of the opening?

A. Well, there is a ravine, and cow trails.

Q. Can you tell me with reference to the passage of cattle coming from the south to the north, whether or not that is a natural place for the cattle to gather, and pass through to the north?

A. It would be; they gather in that locality.

Q. Is it not true there is a little valley running

(Testimony of Drury P. Osborne.)

out through 32, and back around past 31, surrounding that opening at that point? A. It is.

Q. And that valley is a natural gathering place for cattle?

A. The cattle drift into it from the south and the east.

Q. There is a road coming there, isn't there?

A. A road right by.

Q. What road is that?

Q. Tuscarora road passes right by there.

Q. Isn't there another road there also?

A. Another road comes over the Tie Corral country.

Q. How is "Tie" spelled?

A. Railroad ties, that is all the name I know it by. [145]

Q. So that cattle coming down Hot Creek, and straying to the easterly, would catch in that valley?

A. Right in that spot.

Q. And go through that opening?

A. They could, or go around the blue country, either one.

Q. But the creek is inside the opening?

A. The creek runs through the opening, 80 acres, that place belongs to Mr. Russell.

Q. If the cattle coming along on Hot Creek should turn to the left, they could go through this opening here, going in No. 7? A. Yes.

Q. As a matter of fact, the cattle do go through there, do they not? A. They go through there.

Q. What can you say as to the condition of this

(Testimony of Drury P. Osborne.)

fence on the north side, during the fall of 1910 and the spring of 1911, for holding cattle? Did it hold cattle in that neighborhood? A. It would not.

Q. What was the reason for that?

A. Well, the reason for that is, the sheepmen in the spring of 1910, taken it down where they went through with their sheep wagons and things, took it away from Noble's fence, and it was left open from the spring of 1910, say in the middle of May, up to the first of June, somewheres along there, up till the spring of 1911, it was open.

Q. What was the intent of the company in building these fences here, as far as you know it?

Mr. PLATT.—The same objection, if the Court please.

Mr. DENMAN.—That is the very thing you were offering evidence on.

Mr. PLATT.—Same objection, on the ground the foundation has not been laid; it has not been shown that this witness knows the intent of the corporation in constructing the fence. [146]

The COURT.—That objection, I think, is good.

Mr. DENMAN.—(Q.) You said on direct examination you were superintendent of the company?

A. Yes.

Q. And that you had control of the building of fences for the company? A. Yes.

Q. And that under certain instructions from Mr. Kent, within those limitations you had the right to build the fences that were built there?

A. I thought I had; yes.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I object on the ground the evidence does not show that this witness had any instructions from Mr. Kent.

Mr. DENMAN.—Yes, it is in.

The COURT.—In the direct examination?

Mr. DENMAN.—I don't recollect whether he was instructed to do it generally, or whether Mr. Kent instructed; but he said he had received instructions from the company. I withdraw the question.

Q. You said on your direct examination that you had received instructions from the company to build these fences in here? A. Yes.

Q. Can you tell what purpose these fences served?

A. The fences that is outlined on the map there?

Q. Yes.

A. Well, they served to a certain extent to help carry out the plan of construction and irrigation and water rights, and maintaining the company's rights.

Q. What do you mean by water rights?

A. Well, the company owns the water, and they wanted to put a good deal of the country under irrigation.

Q. Now, you have testified that you had made preparations over two years ago to inclose the remainder of these fields on the south? [147]

Mr. PLATT.—If the Court please, that testimony was stricken out.

Mr. DENMAN.—On the contrary, it was allowed.

Mr. PLATT.—The question was as to making preparations as to doing something in the future.

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—It was finally allowed on the question of intent.

The COURT.—Just read that testimony, where he said he had procured wire.

(The reporter reads the record on page 137.)

The COURT.—Read the last question.

(The reporter reads the question.)

The COURT.—Is that on the south? It was on the north, was it not—the Dutton field, is that on the north or south?

A. It is all called Dutton.

Mr. DENMAN.—I withdraw that question.

Q. In your opinion, does the character of this land in the creeks, owned by the company, warrant their inclosure?

Mr. PLATT.—Same objection, on the ground it calls for the opinion of the witness.

Mr. DENMAN.—Showing the intent of the company.

The COURT.—I will allow that question. It is a question of opinion; but his experience there qualifies him as an expert to testify; you can examine him on that point.

Mr. PLATT.—I just want the benefit of the record, if the Court please, and ask an exception on the grounds stated in the objection.

A. It does.

The COURT.—Warrant what inclosure?

Mr. DENMAN.—Warrant their inclosure.

The COURT.—That is, the inclosure of the lands owned by the company? [148]

(Testimony of Drury P. Osborne.)

WITNESS.—Of the lands that are owned by the company.

Mr. DENMAN.—(Q.) What is the character of the soil in this land lying to the north of the fence in 34, 35 and 36, township 40 north, range 48 east?

A. The creek runs down to it; it is black loamy soil, bottom land, and the upland is good grass land.

Q. Grow hay?

A. Grow hay; all tillable land, might be a rocky point or two that would not amount to much, but the bulk of the land is all tillable.

Q. Is it that very light sandy soil?

A. The bulk of the land is black, sandy loam, light, yes.

Q. What would you say as to the character of that soil? A. It is good.

Q. Now, coming westerly and following the blue line continuously—

The COURT.—Just a moment. Is there any dispute as to the character of that river land?

Mr. PLATT.—No, if the Court please. I didn't ask any questions as to the character of that land; I don't see it makes any difference whether good, bad, or indifferent land.

Mr. DENMAN.—Will you concede that is very superior black loam bottom land, that will grow potatoes and onions?

Mr. PLATT.—No, I will not concede it is very superior; but I will concede that that land is watered by certain creeks; and the witness has testified time and again in cross-examination, although I didn't

(Testimony of Drury P. Osborne.)

ask him in direct examination, that it was black, loamy and good land.

The COURT.—I suppose that may be conceded as to all the land laying on Rock Creek?

Mr. PLATT.—I could not concede that, because I don't know. I cannot make a concession on anything about which I don't know. [149]

Mr. DENMAN.—(Q.) Is that true of all the land indicated by the blue, from Opening No. 1 around to the northerly and easterly to North's fence?

A. Except one point.

Q. How many acres does that point cover?

A. Well, there at the Hot Spring, midway between those points, there is a meadow of probably 20 acres, a meadow caused from the Hot Spring, that would be meadow land; it is a different character of land on account of the meadow is made from the hot springs water overflowing; it is kind of an adobe soil, grass meadow.

The COURT.—That is the only point where the land is not good?

A. That is fine land, but of a different character; just as fine land, it would grow hay or anything, but that is, different character of land.

Mr. DENMAN.—(Q.) How does the country rise out of that on the south side towards this Government land here?

A. Out of the bottom land?

Q. Yes.

A. Just starts abruptly, probably for 25 feet, up in the low hills; the bottom land is laying almost

(Testimony of Drury P. Osborne.)

level as a floor, but when you get outside of the bottom, there is probably a bench of 20 or 25 feet up, then you strike just a rolling country.

Q. So that the two characters of country are distinctly separated by the rise between them?

A. By the rise between them.

The COURT.—(Q.) Is there bottom land all up Rock Creek?

A. Yes, that is a solid bottom, level as the floor.

Q. And wide enough to be tillable all the way up?

A. Well, it is from a quarter to a mile and a half wide.

Q. That is all tillable land? A. Tillable land.

Mr. DENMAN.—(Q.) Now take the Willow Creek side; is the same thing true of this land marked in blue, from Opening No. 8 around up to Opening No. "A"; is that the same character of soil? [150]

A. Well, there is one point below the reservoir, there is a gorge in there of about a mile that is not practical to fence for farming purposes, it would be all right fenced for pasture land, but it is not for farming purposes.

Q. In that whole distance there is only that gorge in about a mile?

A. From the point of this Opening No. 6, above the reservoir, from that point to the point where their fence is down, there is about a mile, outside of the water in the reservoir, only about a mile of that country, that is a big level country to farm, bottom land.

(Testimony of Drury P. Osborne.)

Q. And the connecting land you say is good grazing land, where they fenced? A. Yes.

The COURT.—(Q.) How wide is that bottom land up Willow Creek?

A. That bottom land ranged about from a quarter to three-quarters wide.

Q. That is one-quarter of a mile?

A. Quarter of a mile to three-quarters wide.

Q. And on Rock Creek what was the width?

A. Rock Creek is from a quarter to a mile and a half wide, so far as that is concerned.

Q. One-quarter in the narrowest place?

A. Yes.

(A recess is taken at this time until 1:30 P. M.)

[151]

AFTERNOON SESSION.

DRURY P. OSBORNE, cross-examination continued.

Mr. DENMAN.—(Q.) Mr. Osborne, coming again now to the Toejam Mountain country, I want you to go back to the time before there were any fences along the upper ends of Toejam and Siawappe, and I ask you with reference to Toejam Mountain country, whether cattle grazed and were driven through there during that time?

A. That is, you mean in rodeoing time, or going up or down?

Q. Yes.

A. They passed through that country just the same as before I went there; that is the natural rodeo country, all the Siawappe, and Rock Creek and Toe-

(Testimony of Drury P. Osborne.)

jam country, that is the natural country that they bring cattle to the valley and separate.

Mr. PLATT.—You say before you went there they did that?

A. Since I have been there, before them fences was there, they did the same thing they do to this day. That is the rodeo country in there, rodeo in that country and bring them down right through that country, Squaw Valley Ranch and Lake field, everybody takes his cattle there; there they separate them.

Mr. DENMAN.—(Q.) What, if any, purpose would these fences serve with reference to the movement of cattle in that country?

A. Well, two or three purposes. The first purpose was they was the company's cattle, and what comes from the west—in connection with making fields—was to drift the cattle from the Winters side up into the Noble country; this other side was to keep them from coming, what got into the Rock Creek country, was to keep them from coming and getting on the "25" range.

The COURT.—(Q.) You say one of these fences was to keep cattle from getting on the "25" range?
[152]

A. So the Desmond cattle, and such, would come into the country there, that was to keep them from coming down here, and into the St. John country, i.^e they should want to drift that way.

The COURT.—I understood you to say that these fences were to keep the cattle from going onto the "25" range?

(Testimony of Drury P. Osborne.)

A. Well, in one sense of the word, was to shove these cattle in there, instead of coming into St. John field, would shove them up into that Toejam country, and the high hill, to a certain extent, kind of a dividing line between "25" country and that side.

Mr. DENMAN.—(Q.) Mr. Platt asked you whether or not you had ever built any fence along the south line of these 40's, running from Opening No. 1, around to Nelson's fence.

A. South and east.

Q. South and east side, running there to Nelson's fence; I ask you what you have done with regard to fencing that side?

A. Well, I fenced probably a mile and a half or two miles on the south of them 40's off Toejam.

Q. What else have you done with regard to fencing?

A. I have had the posts and the wire, and everything to construct that fence.

Q. What else have you done?

A. Well, I have had it surveyed.

Q. What else have you had done with regard to the survey?

A. I have had the posts set, that is, the corners on sections, and quarter corners, so we would know how to build the fence.

Q. Who did that for you? A. Neilson.

Q. Is the same thing true of this land of the company along Willow Creek?

A. That has been double surveyed, surveyed twice by Neilson, was surveyed in the fall and the posts

(Testimony of Drury P. Osborne.)

and flags was set; that was the winter we begin to start out, that was in the winter of 1910, and in the spring of 1911 Neilson resurveyed—let me go back. In 1909, the fall of 1909, I think it was, he [153] surveyed that line, then in the spring of 1910, he resurveyed that.

Mr. PLATT.—What line?

Mr. DENMAN.—The north line of the property along Willow Creek.

WITNESS.—I could explain that a little better.

The COURT.—The north line of Willow Creek.

Mr. LEWERS.—Let the witness testify what he did, then we get at it quicker.

Mr. PLATT.—He is talking about generalities here; I want to know what he surveyed.

WITNESS.—What I mean to say, I could tell you the first survey and then the second survey. His first contract was to run section lines.

The COURT.—You had better lead the witness just for that purpose, and find out what he did.

Mr. DENMAN.—(Q.) You had a surveyor in your employ, and had the corner posts set up for the fence along the north line of the properties of the company along Willow Creek?

A. I did.

Q. And then you had it surveyed again?

A. Had is resurveyed, that is, retraced.

Q. Retraced. And you think they had put in a portion of the fence around the dam here?

A. Yes, there was other construction when I left, and I have not asked anybody, I don't know whether

(Testimony of Drury P. Osborne.)

it is finished, I have not asked anybody.

Q. The same thing is true about Siawappe?

A. Yes, same thing about Siawappe.

The COURT.—(Q.) Mr. Osborne, have you cut any hay in that country there inside those fences?

A. I have inside of their line; yes, sir, They harvested a grain crop of something like 470 acres this year inside of that fence, and it is all seeded to elfalfa, that is on company's land below that red line.

[154]

Q. Just point out the place.

A. This country right here (indicating).

Q. What did you have there?

A. There was grain. There was grain and potatoes put in below the dam here, of about, when I left there, probably 15 acres of grain or 10 acres, maybe, I don't know just how much there was.

Mr. LEWERS.—10 acres of what?

A. Grain and potatoes. There also was probably 40 acres of grain and potatoes, mostly grain, put in on Toejam, 30 acres maybe, probably, I don't know.

Q. How many acres would you say?

A. Safely say 30 acres; I never measured it; 22 sacks of potatoes was planted there, I know.

Mr. DENMAN.—(Q.) That is, you were trying out that country?

A. Well, there was no trying out; we knew we could raise them if they were attended to.

The COURT.—(Q.) Is that the first year you attempted to raise crops on that ground?

A. It was in 1911, yes, that is the first time we

(Testimony of Drury P. Osborne.)

had them protected, put these other fences up, that is last year was the first year.

Q. Well, have you ever cut any hay down in the southwest corner of the tract, prior to this year; that is, south of the fence?

A. No, sir, not in that direct locality. Now, that was cleaned off, the brush; the brush cleaned off, I told you, in 1910, and the crop was put in in the spring of 1911; that is a continuous work up Willow Creek, and the other ranch, all west of that for two miles or two miles and a half, is alfalfa, and all the other ranch part.

Q. Where do you use the water that is impounded in the reservoir?

A. We use that on the land I am speaking about, take it over that point, over Rock Creek, and to the Mansion field; it is used on this land here just the same, used on the reservoir, then used [155] out again on that field; then take it in the big ditch around a point, take it into another field out in the Mansion field and down into the Lake field, a radius, all told, of probably 20 miles, a ditch.

Mr. DENMAN.—Take the witness.

Redirect Examination.

Mr. PLATT.—(Q.) When did you begin to survey for fences along the inside border of the land represented in the blue? A. In 1909.

Q. How much of a survey did you order made?

A. Do you mean—was your question of a survey?

Q. Well, you understood my question, didn't you?

Mr. DENMAN.—Which survey?

(Testimony of Drury P. Osborne.)

WITNESS.—Of all fences. In 1909 we had 22½ miles surveyed in one tract; then we had,—well I could not say until I see the company's map, on Fraser Creek, the company, probably 30 or 35 miles we had surveyed that year.

Q. In that 35 mile survey are you not including lands that are without this fence?

A. Well, a part of them.

Q. Well, how much of it?

A. Well, there is—I will have to mark it to you. Start in here at section 1, we surveyed 6 miles east, 6 miles north, 6 miles in here, and 4 miles and a half in Noble's field.

Q. Now all that survey was without this fence, wasn't it? A. Without?

Q. Yes.

A. That survey was made with a calculation of building these fences.

Q. Building what fences?

A. These fences you were speaking about, in connection with them. [156]

Q. Well, tell me what fences it was you were to build.

A. Well, it was made to build Fraser Creek fencing and to get these points, like this section corner.

Q. Wait a minute. You say it was made to build Fraser Creek fence, and to get these points; where is the Fraser ranch?

A. Here. (Indicating on plat.)

Q. The Fraser Ranch is outside of this fence, is it not? A. It is joined.

(Testimony of Drury P. Osborne.)

Q. Is not the Fraser ranch outside of this fence?

A. Of that fence.

Mr. DENMAN.—Joins it.

Mr. PLATT.—(Q.) Well, it is outside of it, is it not?

A. It ain't inside of it; that is a sure shot.

Q. Then you made the survey for the purpose of surveying the Fraser Ranch, did you not?

A. I did not.

Q. What did you make it for?

A. I made the survey in connection with the lands of the company. That is Fraser Creek (indicating); these lands, and these lands up here, lands in what is called the Noble field, summer range, to find out where such and such lands was. That is what this 22 miles was made for, to find these section corners; them is all quarter corners and section corners set; they have surveyed this line, and set corners, whenever we touched a section corner or quarter corner, we set a rock or post, also on the inside; when we crossed here on a section corner or quarter corner, we set a post. That surveying was all done in connection with this fencing.

Q. Let me ask you: will you testify upon oath that it was the intention of the Golconda Cattle Company to build fences upon the inside of the blue lines, and along the outer rim of those blue lines; will you testify upon oath it was their intention so to do, and that they did actually institute and authorize surveys [157] for that purpose?

A. Let me call your attention—

(Testimony of Drury P. Osborne.)

Q. Do you understand my question? A. I do.

Q. Will you answer it?

A. I will answer it this way.

Q. I ask for a categorical answer, and then explain.

A. To run this just as the company's lands run, it was the calculation of the Golconda Cattle Company when they made them surveys to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; to fence both sides of their land; I had orders from the Golconda Cattle Company to that effect.

Q. You got those orders?

A. I have not got them.

Q. Don't let me misunderstand you at all: You got the orders to instruct your surveyors to make surveys, with a view of building fences upon the inside of those lands? A. And outside.

Q. And outside? A. Yes.

Q. Weren't the fences constructed on the outside?

A. Not when that survey was made.

Q. When was the survey made?

A. Part of that survey was made in 1909.

Q. And how much of the fence on the outside was completed in 1909?

A. Very little of it; very little fence made in 1909.

Q. Very little fence there at all?

A. None of this fence was here in 1909.

Q. It was all built since that time, was it?

A. Yes, sir, since them surveys.

The COURT.—Do you mean very little of the

(Testimony of Drury P. Osborne.)

fencing on Willow and Rock Creek?

A. There was none of this fence there, from a point probably about here (indicates).

Mr. DENMAN.—Section 9, township 38 north, range 47 east.

WITNESS.—About that point in here, from that point on around here there was none built in 1909.

[158]

Mr. DENMAN.—(Q.) You mean to the east, and up to the Siawappe country? A. Yes.

The COURT.—(Q.) How about the Rock Creek country?

A. Well, I will answer his question. The Rock Creek country was built to about there, and wire, the posts was set clean through in 1909.

Q. That is about half of it, half of that Rock Creek fence?

A. No; hold on. The posts were all set in the fall of 1909, the wire was stretched from this point about, just about Hot Creek, in there, in the fall of 1909.

Mr. DENMAN.—That creek is in section 1.

A. That is, if that map is right.

Mr. DENMAN.—(Contg.) Township 39 north, range 47 east.

A. Yes, sir. It was built to that point in 1909.

Mr. PLATT.—(Q.) Now, as I understand it, so there won't be any misunderstanding, you got instructions to build fences along the outer rim of this land represented in the blue, or the company's lands as you say, and also received instructions to institute surveys for the building of fences along the inner

(Testimony of Drury P. Osborne.)

side, is that true? A. I had instructions.

Q. Was that the extent of your instructions?

A. Well, my instructions was to put that fence there; all of the Golconda Cattle Company's lands that joined up together, that was practical for grazing or farming, was to fence them in and outside, then my instruction went on to say, anything that was practical to farm, clean the brush out, clean off the brush and put it in alfalfa, or anything.

Q. When did you commence to build the fences on the inside? A. I commenced in 1909.

Q. When did you quit?

A. I quit the first day of July, 1911.

Q. You quit building fences then?

A. Yes, sir. [159]

Q. And how much of the fences on the inside did you build?

A. Well, these fences in here, of course this one in here, you see that is where it gets you, where you can't explain it; all of this other country was an outside country, and that country has been fenced, too.

The COURT.—Read the question.

(The reporter reads the question.)

A. As I say about that map there, why I commenced to build the fences, the fence I first commenced to build in 1909—

The COURT.—That is not responsive to the question. He wants to know how much of that fence on the inside you built, if you can tell; one mile, 2 miles, 6 miles, 7 or 10 miles, or whatever it was.

(Testimony of Drury P. Osborne.)

A. That is in that inclosure there?

The COURT.—That is the way I understand it.

Mr. LEWERS.—If the Court please, we object to the question in that form, or to that interpretation of it, because the question was directed to how much inside fence he built in 1909, and the witness has already testified that this map here only shows a portion of the territory that he was building inside fences on.

The COURT.—He can answer with reference to this map how much inside fence he built at that time. Don't go clear around the ranch to do it; tell how many miles, or as near how many miles, as you can.

A. Well, that is in the year of 1909?

Mr. PLATT.—(Q.) I mean from the time that you got your instructions up to the time that you quit.

The COURT.—That means practically how many he built altogether?

Mr. PLATT.—Yes, your Honor.

A. Somewheres near 11 miles.

Q. About 11 miles of fence?

A. Something like that.

The COURT.—(Q.) Do you understand that to be, Mr. Osborne, the [160] total amount of inside fence which you yourself built, or was built under your direction as superintendent?

A. In touching this locality?

Mr. LEWERS.—Shown by Exhibit No. 1.

A. If I could explain I could show.

Mr. PLATT.—It is not a question of intention.

(Testimony of Drury P. Osborne.)

(Q.) You testify, as I understand it, that you or people under you, while you were employed by the Golconda Cattle Company, built 11 miles of fence, is that true, on the inside of that inclosure?

Mr. LEWERS.—No.

WITNESS.—That is in making fields; that is what your question is, ain't it?

Mr. PLATT.—(Q.) You know what I mean by the inclosure, don't you? That inside this rim here. Now, do you understand what I mean by inclosure?

A. Yes. Just wait—

Mr. LEWERS.—I ask that the witness be given an opportunity to answer.

Mr. PLATT.—I am trying to get him to answer.

The COURT.—The witness is very willing to tell what he knows, there is no fault to find with him in that respect; but he tells too much. When the question is asked, how many miles you walked, you should say one mile, two or three miles, and not tell all about why you walked, and so on. Just simply answer the question as it is given, but don't try to give anything more.

A. I should say from looking at that map there, what I built and reconstructed and then took down and rebuilt again, about 11 miles.

Mr. LEWERS.—Now pardon the interruption. (Q.) You mean on the territory shown by Government's Exhibit No. 1? A. Yes.

Mr. PLATT.—Now, if the Court please, I assume any lands without this inclosure are not among the issues of this case?

(Testimony of Drury P. Osborne.)

The COURT.—It will be assumed that these questions all relate [161] to this territory, unless it is very clearly indicated to the contrary, because unless counsel show me very plainly that I must admit testimony with reference to other tracts of land, I don't want it put in. I am not deciding that point, I simply indicate my wish about the matter; confine it just to this particular matter.

Mr. DENMAN.—Where a fence is shown here on the map, I presume it is within the issue to show that is simply a part of a field which is off the map, as showing the reason for its being there?

The COURT.—That is all right.

Mr. PLATT.—(Q.) Now, Mr. Osborne, did you help build this fence in the red, from Opening No. 1 to Opening No. 8? A. I ordered it built.

Q. How long is it?

A. Well, I judge from the way you have got it marked there, it would be about three miles and a half.

Q. About three miles and a half. Now, indicate upon the plat where the other seven miles and a half of the fence were built on the inside in that inclosure.

A. Well, according to your map, this would all be fence built in 1909.

Q. I say built on the inside of the blue lines, and not the outside.

Mr. LEWERS.—If the Court please, I object to the question, because that illustrates just the difficulty we sought to avoid this morning. Taking this exhibit the way they have chopped it off, right

(Testimony of Drury P. Osborne.)

straight through the center of the ranch, something which is in fact, and which the witness applying the ordinary [162] meaning of words, would say was on the inside, according to their artificial showing is on the outside, and that inevitably produces confusion.

The COURT.—That may be true, but I prefer for my own part to find out just what the condition is here, and then if it becomes material to know something about other portions of the ranch, I would like then to have them segregated; I don't want the two mixed together in my own mind.

WITNESS.—Well, I will explain to the Court.

The COURT.—And Mr. Platt's question is directed to the conditions on the tract of land which he has attempted to show on that map. Whether he has shown it correctly or not, is to be determined, but his question is directed to that, and that is what I would like to know also.

WITNESS.—All right, I will explain.

Mr. LEWERS.—But the suggestion is that the term "inside" is used, which, applied to this map, is misleading to the witness.

Mr. DENMAN.—I have a suggestion in that regard. Let us speak of these lands as between the creeks.

Mr. PLATT.—I submit I think counsel are a little fearful whenever I use the term "inclosure" I am talking to a jury here instead of a Court, and that some statement I might make in that regard in the way of a question, would be binding upon the Court.

(Testimony of Drury P. Osborne.)

WITNESS.—Well, I will explain that this fence here—

The COURT.—Now, just wait a moment. Read the question.

Mr. PLATT.—I will ask another, and withdraw the last one.

Q. Outside of the fence indicated by the red on this plat, beginning [163] from Opening No. 1 and ending at Opening No. 8, outside of that fence, and in addition to that fence, how much other fence did you order built upon the rim of land shown upon the blue on this plat, such rim of land pointing or extending up against the Government land upon that plat? Now, do you understand that question?

A. Well, I ordered all of this fence built from this point here around to this point (indicates).

Q. I didn't ask you how much you ordered built.

Mr. LEWERS.—You did ask that.

WITNESS.—You just did ask me.

The COURT.—Wait a moment. Read the question.

(The reporter reads the question.)

Mr. PLATT.—He can answer that, and I will ask him another question. What I want to know is the fence actually built.

The COURT.—Do you understand the question?

A. Yes. He asked how much I ordered built from this point here—

Mr. PLATT.—From an opening indicated as “Opening No. 6.”

A. I ordered the fence built from this point here,

(Testimony of Drury P. Osborne.)

commence at this point, I ordered it built from that point around the dam to this point (indicates). Now I also ordered—

Mr. DENMAN.—Wait a second. That means then—

A. From where the lane goes down and crosses Willow Creek—

Mr. DENMAN.—One moment. That is the place marked “28” inside of the word “Creek.”

A. Yes.

Q. From there easterly to where?

A. To this opening here.

Q. That is Opening No. 6? A. Yes.

Mr. PLATT.—(Q.) When did you order that fence built?

A. Well, I ordered that fence built probably in—in fact, I had a man setting them posts on the north side of this, some time in April.

Q. Of what year? A. 1911.

Q. April, 1911. Now there is no mistake about that date, is [164] there?

A. Well, as I say, I had a man at the dam, and he was packing the posts, of course I hauled posts and everything up, to build that fence in the fall of 1910.

Q. But you ordered it built some time in 1911, in April?

A. Yes. I ordered the men to go and start in to built it.

Q. Outside of this fence indicated in the red, between Opening No. 1 and Opening No. 8 how much

(Testimony of Drury P. Osborne.)

fence did you actually construct and built along the inside of what is represented as the blue upon the plat?

A. Well, when I left they had the fence to about the point of the dam, my men, I wasn't up there; they was stretching the wire. As I say, I know nothing about from this on. I saw this fence finished and coupled up there; that was done in 1911.

Q. Do I understand you to testify that there was a fence actually built when you left from a point about where my pencil is?

A. Oh, no, not down there where this lane goes down in the Willow Creek; that crosses the creek, comes up over this ridge, and back to the dam; that was a fence.

Q. That was a fence built?

A. Stretching the wire when I left.

Q. And that fence was in addition to the fence, was it not, in the red, from a point marked "Gap," down to Opening No. 6, a quarter of a mile? A. Yes.

Q. Encircling the reservoir?

A. The reservoir and this flat above the reservoir, and also below the reservoir.

Q. Now is that all the fence that was built when you left there?

Mr. DENMAN.—On the south side or north?

Mr. PLATT.—On the whole plat.

A. And this fence up here (indicates).

Q. Is that all?

A. Then there would be this fence that is on the east side.

Q. This fence you indicate between Opening No. 1

(Testimony of Drury P. Osborne.)

and the letter [165] "T" is on the outside of the blue, is it not, and not the inside?

A. That may be a trick, I don't know.

Q. Well, I am not talking about tricks. It is indicated upon this plat, is it not, as being on the outside of the blue, and not on the inside?

A. It is the company land; I know that.

Q. Well, is it not indicated on the plat as being on the outside of the blue, and not on the inside?

A. I suppose it is.

Q. Well, is it; I don't want your suppositions, is it?

Mr. LEWERS.—The question has been answered.

Mr. DENMAN.—Of course we will cross-examine on that.

Mr. PLATT.—I think that is manifest from looking at the plat.

Mr. DENMAN.—You have not put in there the company's land in blue on the outside of that; it is not a fair plat.

WITNESS.—I leave it to the Court if it is platted right.

Mr. DENMAN.—The point I make is this, your Honor, that in drawing this plat, that should be in blue in there, to be consistent with the rest.

Mr. PLATT.—I submit if this were in blue it would make no particular difference, in so far as the question I have asked may be concerned, because the point is, if the Court please, even if this is all in blue, the inside of this plat next to the Government land is not inclosed; that is the point I make, I don't care

(Testimony of Drury P. Osborne.)

how much of this land is in blue.

WITNESS.—Well, I can answer—

Mr. DENMAN.—Wait your time; I will ask it later on.

Mr. PLATT.—(Q.) While you were foreman of that ranch, did cattle belonging to any other company or persons, graze and pasture upon the lands indicated upon the plat in the blue? A. Yes, sir.

Q. Who gave them permission so to do?

A. Didn't have to have any. [166]

Q. Well, did anybody give them permission?

A. Nobody.

Q. Was there any understanding between these cattle men and your company that they had the right to do it? A. I suppose there was.

Q. Well, do you know of any such understanding?

A. Well, I don't hardly know how to answer that. Stockmen don't have altogether to ask one another if they go on lands that is not inclosed.

Q. Do you mean to say that the Golconda Cattle Company while you were foreman permitted any cattlemen, regardless of the number of cattle they might have, to go upon any of the lands held in private ownership within this so-called inclosure, and graze and feed their cattle?

A. If they wanted to, yes, sir.

Q. If they wanted to do it they could do it?

A. Yes.

Q. Whether it was private lands or whether it was Government lands, do you testify to that?

A. Yes.

(Testimony of Drury P. Osborne.)

Q. And there is an open, outstanding privilege to everybody— A. There is no invitation.

Q. (Contg.) To come in and graze cattle on the private lands of the Golconda Cattle Company?

A. They have a perfect right to graze their cattle on the Golconda Cattle Company's land as long as it is not inclosed.

Q. Was that proviso and condition made by your company to these cattlemen? A. No, sir.

Q. Why do you so testify?

A. Because that is the custom of the country.

Q. Any land then that is not inclosed, anybody can come in and herd or graze cattle upon it; is that true?

Mr. DENMAN.—We object, it is calling for the conclusion of the witness. [167]

Mr. PLATT.—You have been asking opinion questions here for an hour.

The COURT.—Make your objection, and the Court will rule on it.

Mr. DENMAN.—I was going to intimate we had reached the limit on that line.

Mr. PLATT.—I objected to opinion testimony and—

Mr. LEWERS.—There is an objection, I think.

The COURT.—I will overrule the objection.

WITNESS.—They can.

Mr. PLATT.—(Q.) Suppose the land is inclosed, what is the understanding?

Mr. DENMAN.—There is no testimony of any understanding at all.

Mr. PLATT.—Or what is the custom?

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—Object to that on the ground it calls for the opinion of the witness; there is not shown to be any custom.

The COURT.—I don't think that is necessary. I will sustain the objection to that.

Mr. PLATT.—(Q.) Has it been the custom of the Golconda Cattle Company to permit ranchers or cattlemen to graze their cattle upon lands which were inclosed by the Golconda Cattle Company?

A. These as was inclosed in their fields, no, not without permission.

Q. Not without permission.

A. That is, of their fields.

Q. From whom did they get permission?

A. They would have to get permission from the foreman or the superintendent.

Q. Did any cattlemen ever come to you while you were foreman and ask your permission?

A. To put cattle in that locality?

Q. Yes. A. Never did.

Q. Did any cattleman ever come to you while you were foreman and ask permission to graze his cattle upon any of the inclosed lands shown upon this plat?

A. He did not. [168]

Q. Did any cattleman ever come to you and ask permission to graze his cattle in and about the lands owned by the Golconda Cattle Company near what is known as the reservoir?

A. I never have seen the time but what they could go in there and graze.

Q. Without permission?

(Testimony of Drury P. Osborne.)

A. Without permission.

Q. How about these lands you put in alfalfa, which you testified were within the inclosure?

Mr. DENMAN.—Which inclosure do you mean?

Mr. PLATT.—Within the large inclosure.

Mr. DENMAN.—He testified they were in fenced fields.

Mr. PLATT.—(Q.) How about these lands you testified were fenced off and in alfalfa, did anybody ever come to you as foreman, and ask that privilege to graze their cattle in those lands? A. No, sir.

Q. Was it a privilege given to cattlemen to do that?

A. If they wanted to hold a bunch of cattle in any of these fields, if they wanted to hold a bunch, moving stock, if they would ask you—they didn't have to ask you—it was customary to come to that field, if it was night up there, and nothing there, no growing crop, they had a right to turn in and hold over night, the same as any other cattlemen in the country.

Q. Suppose they wanted to stay a week instead of one night?

A. That is not a supposed case, because a man would not want to do that.

Q. Was it within your experience that any cattlemen grazed cattle within this inclosure represented by the fence, for a longer period than one night?

Mr. DENMAN.—What inclosure do you refer to?

Mr. PLATT.—By the big fence on the plat.

A. So far as that is concerned, the cattle shift through there, [169] back and forth; I don't see

(Testimony of Drury P. Osborne.)

where that question pertains to that.

Q. Did any cattleman ever ask you as foreman for the privilege and right to graze his cattle upon any of the lands represented in the blue upon this plat?

A. He never did.

Q. Now, you are positive about that, are you? You are absolutely positive?

A. I want to know, on the lands that are not in the company's fields?

Q. That is not the question I asked you. I asked you whether any cattleman had ever asked you the privilege to graze his cattle upon any of the lands represented upon this plat as being in the blue.

Mr. DENMAN.—Object to that as too vague and indefinite. Ask him whether in the inclosed fields or outside of the inclosed fields.

Mr. PLATT.—I cannot make it any more definite than when I say on the lands shown inside the blue.

The COURT.—I will overrule the objection.

A. Never did.

Mr. DENMAN.—You understand that last question referred both to the inclosed fields, and those not inclosed? A. That is all right.

Mr. PLATT.—(Q.) Now, you thoroughly understand it, and you don't want to change your answer, do you?

A. I ain't going to change it; I am speaking about all that territory.

Q. Do you know of any cattleman or men during the time that you were foreman, who drove their cattle across the country shown in the white, within

(Testimony of Drury P. Osborne.)

this so-called inclosure, and who started to drive their cattle over that land from the west?

A. When the fence was in the supposed inclosure, or before any time?

Q. I will ask you before. A. Yes. [170]

Q. How long before? A. About 3 years.

Q. Can you name the cattlemen who grazed their cattle over these Government lands indicated, and who started them across those lands from the west about 3 years ago? A. Yes.

The COURT.—Was that 3 years ago, or 3 years before the inclosure?

Mr. PLATT.—Three years before the inclosure.

A. That is 3 years ago, that is the way I will answer the question. John Saval took his cattle through there.

Q. Anybody else?

A. Fairchild brought cattle through there from the other way, to Midas.

Q. I am not talking about the other way. You know what I asked you. Who else?

A. Several little bunches of cattle back and forth, I never paid no attention to whose they was.

Q. You said you knew.

A. I said I knew Saval took his through.

Q. Who else?

A. I have seen cattle going through there, down to the road, but I didn't go every time to see whose they were.

Q. As a matter of fact, haven't you many times before that inclosure was up, seen cattle go across

(Testimony of Drury P. Osborne.)

that Government land from the west? A. No.

Q. No? A. No, sir.

Q. Didn't you just testify you did?

A. I see them cattle go across there of Saval's. You speak from this point here (indicates on plat); the cattle drift into this country, driving cattle through here, goes up the road, goes up to Snow Canyon, and up that country.

Q. Do you know what west is on that map?

A. Yes.

Q. Didn't you testify many times, 3 years before the inclosure [171] was put up; or, as you modified it, 3 years ago, that you saw cattle being driven across this Government land from the west?

A. I have only saw Saval drive his cattle when he was moving.

Q. Have you ever seen anybody else's cattle go over that inclosure from that direction, before the inclosure was up?

A. I suppose I have seen some few cattle go over there; they might not have went across the inclosure, I didn't follow them; I saw cattle on Willow Creek; and I say I didn't see them cross it.

Q. Did you ever see them upon any of this Government land, coming from the west, before that inclosure was up?

A. Well, coming from the west, what do you mean? Coming across the white there from the west?

Q. Yes, coming across the country from the west, I mean the left hand side of this plat, going toward

(Testimony of Drury P. Osborne.)

the right hand side of the plat.

A. No, I never did.

Mr. DENMAN.—You mean by that, coming up from the creek?

Mr. PLATT.—I mean coming anywhere from the west here.

A. No.

Q. Did you ever see Saval's?

A. I see Saval drive his cattle, moving his cattle through that country.

Q. Did you ever see anybody else driving his cattle through that country?

A. Seen several little bunches of cattle going through that country; don't know whose they was. Fairchild drove his cattle back through there, his dairy cows, from Midas back home.

Q. Came from the west to an easterly direction through there?

A. Through the road, through the trail.

Q. You say you saw several bunches of cattle going across this Government land from the west?

A. I didn't say that at all.

Q. What did you say?

A. I said I didn't, only them that was drove.

[172]

The COURT.—He said he saw one bunch of cattle driven through there, and saw some other bunches, but didn't know to whom they belonged; but he saw Fairchild's driven across.

A. That is on the trail.

Mr. DENMAN.—He referred, your Honor, to

(Testimony of Drury P. Osborne.)

driving through this trail here.

The COURT.—The question was anywhere from the west, which includes any particular point that any of you want to put there on the west.

Mr. DENMAN.—He checked it up afterwards to there.

The COURT.—You understood that question, did you; that it was any band of cattle that was driven from the west across Rock Creek, through this territory in question?

A. Well, of course I would have to answer yes.

Q. Have you seen cattle that were not driven, go across there? A. I have not.

Mr. PLATT.—(Q.) And that, as I understand, you saw before this line of fence along the western side of this plat, or the left hand side of this plat, was put up?

A. Yes.

Q. Did you ever see any sheep driven across there from the west? A. Yes.

Q. Who drove the sheep?

A. Well, quite a number.

Q. Well, name some of them.

A. Tom Nelson, Burr Stewart and Carter; Wheeler Live Stock Company, Palo Alto Company, Noble and Smith.

Q. Anybody else?

A. Probably Golconda Cattle Company.

Q. When did you see them driven across there?

A. I saw them driven across there, some of them same people has driven sheep through there every

(Testimony of Drury P. Osborne.)

year since I have been with the Golconda Cattle Company. [173]

Q. Did you see them drive the sheep across before this line of fence was up along the west?

A. Yes, sir.

Q. Do you recall anybody else?

A. Oh, there is lots of sheep men, sometimes 180 or 190 bands crosses there in a year, up in that country.

The COURT.—How many bands?

A. Probably 180 bands, that would be probably three hundred thousand sheep crosses that country in a year; that is through this country, through the trails, some up here and some through here (indicates on plat).

Mr. PLATT.—(Q.) When did all these sheep cross this country indicated in the white within this boundary line?

A. Some of them, some people crosses them sheep every year. Tom Nelson puts his sheep in there every year, commences in at that lane, and lambs in that territory every year, has ever since I have been there, and he tells me and other people tell me, he has had it for something like 18 or 20 years.

Q. He has had it?

A. That is, he has used it.

Q. Do you know who gave him the privilege of using it?

Mr. DENMAN.—We have been all through that before.

WITNESS.—Yes, I have thrashed that out.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—Well, I have asked you the question, do you know? A. I do not.

Q. Were there more sheep crossed that land from the west before that line of fence was up, than after it was put up? A. No more.

Q. You know that positively? A. Yes.

Q. How do you know that?

A. Anybody that wants to cross that country when it was open has the same privilege to cross that country to this day, without any interference whatever.

Q. And for that reason you say the same number crossed it after the fence was up as before? [174]

A. Could if a man wanted to take them through. Spanish Ranch don't bring their sheep that way; Stewart and Carter don't take their sheep that way, they take them up Ruby Valley.

Q. That is the reason you give why as many sheep cross now as before the fence was up?

A. Could cross now if there was as many.

Q. How is that, again?

Mr. DENMAN.—What is the reason?

Mr. PLATT.—(Q.) They could do it if they wanted to, that is the reason you give?

A. They could do it if they wanted to, yes.

Q. Now, you testified there were a few places in the Toejam Mountain region that a person could cross that with a wagon; now what were those places?

A. I can take you across most any place there with a wagon.

(Testimony of Drury P. Osborne.)

Q. When you said a few places, you didn't mean it, did you?

A. A few places in that smaller territory, yes, you can go through that country with a wagon, through there with a wagon anywhere, you can go through it with a wagon, I can.

Q. When you testified in cross-examination that you could cross there in a few places, you meant you could cross there any place in a wagon, didn't you?

A. Yes, any man that knows anything about a mountain country knows, you might run up against a rock, probably have to turn out a little, go over or around a little, or something, but I can take you through there, if it was put down to your question, and a man marked his wagon tracks, I could put you through there in a hundred places.

Q. If you knew a few possible ways by which you could go through there, you could take me through?

A. I know I can go through it; I have been through it.

Q. And almost any place there? [175]

A. I could take a buggy team and go through any place, if I wanted to get over that hill.

Q. Now there is no mistake about that, is there?

A. There is not.

Q. Do you know, Mr. Osborne, what the purpose of building that entire fence as shown upon the map, was; what was the purpose?

A. Well, there was two or three purposes.

Q. What were they?

A. One was to steer cattle up to the mountain, and

(Testimony of Drury P. Osborne.)

the other purpose was the company's intention of fencing their own lands.

Q. Any other purpose?

A. As I say, that would be enough, would it not?

The COURT.—(Q.) Well, can you think of any other reason, except those you have given?

A. No, it was dividing lines, to a certain extent, to put the cattle up; no use in going in any details about explaining why certain propositions was put there, unless something else could be explained in connection with it. That is the proposition about that.

The COURT.—I think that is a sufficient answer for the present unless they ask another question.

Mr. PLATT.—(Q.) Was one of the purposes of this fencing to keep the cattle of the Golconda Cattle Company that might get into this inclosure here of the Government land, from getting out? A. No.

Q. That wasn't the purpose at all?

A. They would get out.

Q. But the fence wasn't built to keep anything in, was it? A. No, sir, it was not.

Q. That wasn't the purpose of the fence?

A. No.

Q. Was it built to keep anything out?

A. No, sir, it wasn't built to keep anything out; that is, to keep it out, because that— [176]

Q. (Intg.) Then, as I understand you to say, the fence was not built to keep anything in, and it was not built to keep anything out; is that right?

A. As I said before, the fence was built with the object of helping steer stuff up, and at the same time

(Testimony of Drury P. Osborne.)

with the object of building the fence, was for the company to fence their lands.

Q. To steer stuff up where?

A. Into the high mountains. I tell you, if you were a cow man, a cow man could explain it.

The COURT.—Haven't we been over that already?

WITNESS.—We have been over it time and again.

Mr. PLATT.—It was asked in cross-examination, and I was endeavoring to straighten the witness out for my own information, and for the benefit of the Court, in redirect examination. I did not ask the purpose of the fence, or any opinion of the witness concerning the fence, in my examination, that was drawn out by counsel.

Mr. DENMAN.—It was cross-examining on intent, though.

Mr. PLATT.—That is all.

Recross-examination.

Mr. DENMAN.—(Q.) I just want to ask one or two further questions. This fence here from opening No. 1 to T. 39, R. 47 east, is an inside fence towards this Creek country, of a field on the outside, that ought to be marked in blue if it were similarly marked to these lands here; that is correct, is it not?

A. Yes.

Q. And all these lands here, I am referring now to the lands westward from North's fence for about a mile and a half or two miles. A. Two miles.

Q. In order to make the map a true map, there should be blue lines [177] or blue tinting around the inclosure, or in the inclosure, beginning at T. 39,

(Testimony of Drury P. Osborne.)

R. 47 east running west to 19, on the line drawn on the map, down to the line opening No. 1, and back up to the point of commencement; that is correct, is it not? A. Approximately, yes.

Q. That should be in blue?

A. Yes, these lands that are marked blue on here inside, I don't see why these should not be marked blue to correspond.

Q. And the same thing is true, is it not—

Mr. PLATT.—I suppose we are to be governed by that opinion, if the Court please?

The COURT.—Do you expect to prove title to those lands in that way? There is an admission that the blue land there is land in private ownership, and that the white land is in Government ownership.

Mr. DENMAN.—Inside the creek.

The COURT.—The admission don't go any further. It seems to me it would be just as well, without examining witnesses, to concede that, if it is the fact.

Mr. PLATT.—Why, if the Court please, as I stated to your Honor, it does not make a bit of difference to me how much land they prove to have owned outside of that fence, because I don't consider it an issue in the case.

The COURT.—I understood the purpose of your question, where you show a line on the inside of the blue, and some of the blue land fence out, you naturally expect the Court to draw an inference as to the purpose of that fence?

Mr. PLATT.—That is true, if the Court please.

(Testimony of Drury P. Osborne.)

The COURT.—Now, you have there a situation where the line is drawn on the outside of the blue, is it not; the blue is all on the inside of the line? [178]

Mr. PRATT.—That is true.

The COURT.—Now, I don't understand exactly why you want to show that there is still blue land on the outside of the line, and not inside the inclosure, what is the purpose?

Mr. DENMAN.—The purpose of that is to show this: These little knobs here (indicating), which are cross-cut pieces, a straight line just cutting off these notches at the end, are surplus pieces put aside, and that this is a part of a big field here; so when he was asking about inside fences, how many miles of inside fences we built, that was a part of an inside fence. Here is the outside fence, here is the blue out here, and here he had the fence outside. Now, the question is what inside fences have they built?

The COURT.—You call it an inside fence and he calls it an outside fence, and you want the Court to understand distinctly what it is?

Mr. DENMAN.—Yes.

The COURT.—I don't know that it is necessary to prove title to that land for that purpose. Unless that is disputed, I shall accept it as true.

Mr. PLATT.—As I have so many times stated, it is immaterial to me whether they have title to this land or not. It is admitted here that they have built and maintained these fences.

Mr. LEWERS.—Will you admit we do have title to that land out there, for the purposes of this case?

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I don't know whether they have, but for the purposes of the case, I would willingly admit it. I cannot see its materiality, its bearing upon the issues at all.

Mr. LEWERS.—We assure you, Mr. Platt, we do have title to that; and for the sake of facilitating the hearing, just as we stipulated to save time, on the inner land, we ask whether you will not equally well stipulate as to that. [179]

Mr. PLATT.—Well, we could not stipulate that all of the blue land belongs to the Golconda Cattle Company, because there is some of it that does not; that is, where it connects with these other fences; but I think substantially all of the land indicated in the blue, within the fence, belongs to the Golconda Cattle Company, together with some of these lands on the outside.

Mr. LEWERS.—That is not the question.

Mr. DENMAN.—The testimony is that the fences go to the extent of the land, and that outside of that it is other land. Now, all the land to the south of Opening No. A in blue, with the exception of 80 acres—

WITNESS.—Excepting Mr. Russell's 80 acres.

Mr. DENMAN.—(Contg.) At opening No. 6, and around to the beginning of the map, the blue at the southwest corner, the testimony is that that belongs to the company. And the testimony is that the land west from North's fence in the blue, around to the southwest corner is the company's land. That is what you want, as I understand it?

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I think so. That includes all of the land within the blue, as I understand it, with the exception of 80 acres, which you say belongs to Russell?

Mr. DENMAN.—And the blue at the northeast corner, above Opening A.

The COURT.—Does that mean all the blue below Opening A, is company land, excepting 80 acres?

Mr. DENMAN.—That is the testimony.

Mr. PLATT.—Who do you contend owns that?

Mr. DENMAN.—I don't know. I don't make any contention about it.

Mr. PLATT.—You made no contention or admission in regard to that? [180]

Mr. LEWERS.—I will admit that Thomas Nelson owns it, as far as I know.

WITNESS.—Southwest quarter of section 5, 80 acres.

Mr. PLATT.—As I understand it, Mr. Nelson owns 80 acres of that land up in the northeast corner?

WITNESS.—The company owns 80 acres here, and the supposition is that Nelson owns the rest of that patented land.

Mr. PLATT.—May it be admitted, if the Court please, without proof, in order that we may save time, that all of this land in the blue, near the representation upon the map, "Toejam Mountain" is owned by Mr. Nelson, save and except 80 acres, which is owned by the Golconda Cattle Company.

Mr. DENMAN.—I don't think we want to admit Nelson owns it. We admit it is not owned by us.

WITNESS.—I don't know that Nelson owns it.

(Testimony of Drury P. Osborne.)

Mr. DENMAN.—We admit it is in private ownership, but is not owned by us, with the exception of 80 acres.

Mr. LEWERS.—We suppose it is Nelson's.

Mr. PLATT.—(Q.) Do you know, as a matter of testimony, whether Nelson ever leased any of those lands from the company?

A. According to the blue, you have stated all the time here in the blue is patented land. Now, of course, we know the point we own to, but we are not supposed to know who owns the other patented land, these 40's in here (indicates), I ain't swearing I know who owns them at all, and I say the same up there.

Mr. LEWERS.—(Q.) Have you ever heard who owns them?

A. I have heard that Tom Nelson owned them.

Mr. PLATT.—(Q.) That is the rumor, is it?

A. That is the rumor, I have heard that.

Q. Have you any leasing privilege at all from Nelson to use those lands up there? [181]

A. None whatever, no leasing proposition.

Q. Have you any understanding with Nelson that you can use those lands? A. What lands?

Q. Up near Toejam Mountain, indicated in the blue? A. No, sir.

Mr. PLATT.—That is all.

By Mr. DENMAN.—(Q.) Suppose cattle were confined in this territory here, and the company had fenced its lands, and the blue were completely fenced on this map, what would happen to cattle grazing on that Government territory?

(Testimony of Drury P. Osborne.)

A. Starve to death for water.

Mr. PLATT.—I object on the ground the question is too general. They might freeze to death, or might not, which of course would not affect any of the issues in this case. And I object on the further ground the question calls for an assumption on the part of the witness, as to what might happen, physically or otherwise, to cattle, calling for an expression of opinion and an assumption.

The COURT.—I don't think it is very material; the Court will not be misled by it very much.

Mr. DENMAN.—The only point is, all the water is in the blue.

The COURT.—The Court would understand ordinarily if you put cattle in a close field where they cannot get out, something serious is going to happen to the cattle.

Mr. LEWERS.—That is, where there is no feed.

The COURT.—I am not adding any conditions. I have lived in Nevada long enough to know if you put cattle in a field and fence them in, and there is no opportunity for them to get out, it is rather a serious thing for the cattle. I don't think it will be necessary to prove it any further. [182]

Mr. DENMAN.—The point I am making is, if that were done, there would be no water for the cattle.

Mr. PLATT.—Do I understand the contention is if the land on the blue were fenced on the inside of the blue, because those fences were up, there would not be any water on the inside.

Mr. DENMAN.—Probably.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I am glad to know the view point. I don't see how a bare wire fence is going to prevent irrigation of lands. That is all.

Mr. DENMAN.—(Q.) Can you get water from any of these creeks, upon this Government land up in here? A. None whatever.

Q. Why?

A. Well, I will take that answer back. There is a canal surveyed out of Toejam, in across here (indicating), to come down into the reservoir through a long draw that comes down through here, by a cut of about 30 feet out of Toejam, through the rim of that hill, 30 feet; you can bring water in a long draw.

Mr. PLATT.—Just mark where the draw is.

A. That is what I have heard, I never have seen the survey.

Mr. DENMAN.—(Q.) That is all you know about it? A. I have heard it.

Mr. DENMAN.—I move to strike it out on the ground it is hearsay.

Mr. PLATT.—I contest the motion to strike out on the ground the witness testified positively as to the building of a canal, and testified positively that there was a draw here.

WITNESS.—Well, as I say, I testified that I have heard there was one time there was a proposition of bringing water over into the Willow Creek side, I don't know whether it was practical, I never surveyed it, or know nothing about it.

Mr. DENMAN.—I move to strike out the testimony on the ground it is hearsay.

(Testimony of Drury P. Osborne.)

Mr. PLATT.—I resist the motion. [183]

The COURT.—I will grant the motion, on the ground it is immaterial.

Mr. PLATT.—Your Honor will give us the benefit of an exception.

The COURT.—Certainly.

Mr. PLATT.—And I desire to cross-examine the witness on the question as to whether water could in fact be conducted on any of these lands, for the reason we consider it is material.

The COURT.—Why, Mr. Platt?

Mr. PLATT.—As a part, if the Court please, of this scheme of the Golconda Cattle Company by attempting to build fences upon its own lands to inclose Government land, for the purpose of ultimately using and watering those lands, for the purpose of grazing their own stock therein, and without acquiring ownership from the Government of the United States to the land; in other words, using this fence as a guise, for the purpose of using for nothing lands belonging to the Government.

The COURT.—You want to show the possibility of another use; that water can in some way be got on those lands for irrigating purposes. The testimony all is that for some months in the year there is grass on those lands; and while there was some testimony to the effect that cattle could not get any water there, I did not understand from the testimony that has been given, that all those creeks were so fenced that cattle inside the fences could not get any water.

Mr. PLATT.—Then there is another purpose, if

(Testimony of Drury P. Osborne.)

the Court please, and that is this: If it may be shown from the testimony that these lands could be irrigated either by the Golconda Cattle Company, or anybody else, they certainly would be much more valuable than if they could not be irrigated.

The COURT.—I will allow you to put it in, but I still think it is not very material. My present impression is that it is not [184] material, but if you think so, it is like a good deal of the other testimony that goes in, I don't see the relevancy of it, but I assume counsel will point it out before you are through with the case.

Mr. PLATT.—(Q.) How big is that dam?

Mr. DENMAN.—What dam? Which one?

Mr. PLATT.—There is only one I know of, that the witness referred to in cross-examination. I am examining him redirectly now upon his cross-examination. You asked him about a dam and he was testifying.

WITNESS.—What dam do you mean?

The COURT.—Is that the reservoir?

WITNESS.—There is several dams.

Mr. PLATT.—(Q.) Didn't you know what dam you were testifying about when counsel asked you?

Mr. DENMAN.—I didn't ask about a dam.

Mr. PLATT.—I submit that he did, and the record shows it.

A. That dam, yes, I know about that dam; that is, I don't know how big it is.

Q. Oh, you don't? A. No.

Q. Did you ever see it? A. I almost made it.

(Testimony of Drury P. Osborne.)

Q. You don't know how big it is?

A. No. What I mean is I don't know the exact number of cubic yards in it, and I don't know how many acre-feet it will hold, or anything of that kind. All I know is that I had the big end of that work done on it.

Q. Can you give me an approximate estimate, within a mile, as to its dimensions?

A. Mile of water, or what?

Q. How big do you think it is?

The COURT.—About how many acres.

A. How many acres? Well, it would probably cover, to its full capacity, probably 300 acres. [185]

Mr. PLATT.—(Q.) Is it ever filled to its full capacity?

A. Yes, sir, and runs over for months.

Q. And runs over? A. And runs over.

Q. Runs over freely? A. Yes, sir.

Q. Well, it could be enlarged then, could it not, to hold more water?

A. It could hold the whole Tuscarora mountain.

Q. No question about that, is there?

A. No question but what it will hold a lot of water.

Q. If it were enlarged to hold a great deal of water, and could hold all this Tuscarora Mountain water as you testified, could any of these Government lands be irrigated from it? A. Not practical; no.

Q. Why not?

A. Because they are too rough, too rolling.

Q. It would be impossible to get any of that water upon any of these Government lands?

(Testimony of Drury P. Osborne.)

A. I suppose if it was built up high enough, you could on some of them.

Q. If the dam were constructed properly, with that end in view, and built high enough, these lands could be irrigated, could they?

A. Very little of them, if any.

Q. Well, how much?

A. I don't know, I am no surveyor.

Q. Could any of them be, in your opinion?

A. Could not say any of them, no.

Q. Would you say they could not?

A. No, I would not say they could not.

Q. Don't you know, as a matter of fact, many of these lands are not precipitous, are not mountainous, but, as a general thing, this is a rolling plain?

A. A rolling plain?

Q. Yes. A. Well, it is rolling land.

Q. There are no high mountains in it, are there?

A. No high mountains, but some long high ridges in it, yes. [186]

Q. Don't you know this land begins to get high, and elevates and comes up high as it goes towards Toejam Mountain? A. Certainly.

Q. Is not that the fact?

A. Natural raise in the country.

Q. There is a natural raise in the country up toward Toejam Mountain, isn't there? A. Yes.

Mr. PLATT.—That is all.

Mr. DENMAN.—(Q.) Would it be practical to build up that dam on that present damsite, and irrigate any of that Government land?

(Testimony of Drury P. Osborne.)

A. It would not.

Mr. PLATT.—Just one more question. (Q.) Do you know of any other reservoir sites for dams upon any of the lands indicated in the blue upon that plat?

A. That would only be how an engineer put them up, and the company that wanted to put up the money; I don't know of any that—I know of several reservoir sites, but whether it would be practical to put the money in to build the reservoir for what lands would come under the reservoir, that would be up to the people that owned the lands, and the engineers.

Q. Don't you know, as a matter of fact, there is a natural reservoir site about a mile and a half below the dam?

A. That would be according to the way the engineer would figure it out.

Q. I ask whether you know it; if you don't know it, say so?

A. In my own judgment it is not practical.

Q. Was it ever discussed between you and anybody? A. Never was.

Q. Well, did you figure out in your own mind a reservoir site about a mile and a half from that dam?

A. Well, I know where all them places are, and there is a place [187] where the canyon comes close together, but there is no territory behind to hold water, it is just in the canyon.

Q. But there is a place to build a reservoir there?

A. You can build a reservoir anywhere if you have got the money, it takes the mazuma.

(Testimony of Drury P. Osborne.)

Q. There is no question of building a reservoir there, with water?

A. No; of a good year no question of filling that whole Squaw Valley with water, of a good year.

Mr. PLATT.—That is all.

Mr. DENMAN.—(Q.) What do you mean by Squaw Valley?

A. That represents the little tail end; the Squaw Valley Ranch and the Squaw Valley country, that is no part of it at all.

Q. How large is the Squaw Valley Ranch?

A. The Squaw Valley Ranch has about 40,000 acres in it.

Mr. DENMAN.—That is all. [188]

[Testimony of William Willis, for the Plaintiff.]

WILLIAM WILLIS, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. Just state your full name, Mr. Willis.

A. William Willis.

Q. Where do you live? A. Elko.

Q. What is your present occupation?

A. Well, you mean position or occupation?

Q. Do you hold any official position?

A. Yes. I am County Commissioner, one of the County Commissioners of Elko County, chairman.

Q. How long have you been a County Commissioner of Elko County?

A. This will be the fourth year.

(Testimony of William Willis.)

Q. You have been acting continuously then for four years in that capacity?

A. Not quite four, this will be the fourth year; a little over three years.

Q. Are you acquainted with what is known as the Squaw Valley Ranch of the Golconda Cattle Company? A. Yes.

Q. Have you ever been upon the property?

A. I have.

Q. I call your attention to a plat upon the black-board, Mr. Willis, and I will ask you whether you can identify the property and its location from that plat. You might step up and examine it.

A. I don't know whether I can or not, unless I can find the town of Midas there.

Q. I call your attention to the creeks indicated there, and to the watercourses, together with what purports to be the road leading from Midas, as I understand it, to Gold Circle.

Mr. DENMAN.—Midas to Gold Circle?

WITNESS.—Midas to Tuscarora. [189]

Mr. PLATT.—(Q.) How did you get your familiarity with that property?

A. Well, I have lived in that portion of the country for, altogether, off and on, for about 21 or 22 years, and hunted on Willow Creek below the dam; and then I was elected from that district, from Midas; and I mined in Midas, and travelled back and forth from Elko to Midas, and once or twice I would go through by way of the ranch, but principally go around the old road, and cross over Rock Creek, and

(Testimony of William Willis.)

leave the ranch off to my left, in going to Midas.

Q. Did you ever have occasion in your official capacity to visit the property?

A. Well, as Commissioner, you mean?

Q. Yes.

A. Well, I went there once to see Mr. Osborne.

Q. When was that, Mr. Willis?

A. If I am not mistaken, it was in the, along in May or June, of 1909, it may have been 1910, but I think it was 1909.

Q. Do you mean Mr. Osborne who was then foreman of the Squaw Valley property of the Golconda Cattle Company?

A. Yes, he had charge of the ranch up there.

Q. Did you have a conversation with him then?

Mr. LEWERS.—If the Court please, we object unless some better foundation is laid, because this is directed to a time prior to any period when it is alleged any fence existed that is now complained of, and I don't understand the purpose of the testimony. It may be that it is preliminary to something which is relevant, but any situation existing at that time obviously is not an issue before the Court at this time

Mr. PLATT.—If the court please, I am trying to lay the foundation, and will connect up this conversation with other conversations, bringing it up to after the time that this complaint was filed. [190]

The COURT.—I will overrule the objection for the present.

A. I did.

(Testimony of William Willis.)

Q. State generally whether or not the conversation pertained to the fence owned and controlled by the Golconda Cattle Company, and represented upon this plat by the exterior black and red lines.

Mr. LEWERS.—We object on the ground that there is no foundation laid for any such question, inasmuch as it already appears from the testimony of the Government, the fence to which Mr. Platt is now calling attention was not in existence at that time.

Mr. PLATT.—Well, it appears, if the Court please, that a part of that fence was in existence at that time.

Mr. LEWERS.—Then the question should be reformed.

The COURT.—It seems to me there was some testimony to the effect that the fence down in the triangle, running up Rock Creek and running up Willow Creek for a certain distance, was in existence in 1909.

Mr. LEWERS.—The posts were put up for part of that fence in 1909, and the wire stretched the following year, above there; there was some fence there, but Mr. Platt's question goes away up above, and the question is misleading. I would suggest that the witness be asked what the conversation was.

The COURT.—I will allow that question. He is asked if there was a conversation about the fence, but I don't think it is really necessary to put the dimensions of the fence in that question, because we will never get through if we try to be as definite as that. He will simply answer yes or no, whether there

(Testimony of William Willis.)

was a conversation about the fence.

Mr. PLATT.—The purpose is to lay the foundation for that conversation.

The COURT.—The question may be answered.

Mr. LEWERS.—We desire an exception. [191]

The COURT.—You may have the exception. Just state whether or not there was a conversation about the fence there or not.

A. Yes, I did.

Mr. PLATT.—(Q.) Now, I wish you would state what that conversation was.

A. Well, there had been complaints made—

Mr. LEWERS.—Now, if the Court please, we object to anything except the conversation.

The COURT.—Just state the conversation, just what your talk was. You need not state anything that led up to it; simply state what you said and what Mr. Osborne said.

A. I told Mr. Osborne that we would want him to remove a portion of the fence—I expect this place I am asked about now would refer to the gates on the road between Willow Creek and the ranch, crossing Rock Creek. There was a gate on either side of the road, and I cannot get at that, that was not the conversation. I had no conversation with Mr. Osborne at that time about those gates or about that fence.

Mr. PLATT.—(Q.) Did you visit the property at that time?

A. Later I did, but I had no conversation until quite a while later, I think it was in 1910 that I had

(Testimony of William Willis.)

the conversation with Mr. Osborne about the gates.

Q. What was the conversation in 1910?

A. That was simply,— I went over there with Mr. Osborne and Mr. Webb to point out what the county wanted them to do to remove those gates.

Q. What did Mr. Osborne say?

A. They said nothing about the gates. Nothing at that time, Mr. Platt.

Q. Did you have another conversation with him?

A. Oh, yes, sir; before this gate conversation took place.

Q. When did you have that conversation?

A. That was in the spring or early summer of 1909.

[192]

Q. And what was that conversation?

A. That conversation was about a fence, a piece of a road that had been fenced in, I think it is just northwest of the Ranch house, it is between the Ranch house and the town of Midas, the direction that the town of Midas was in; that was the first conversation I had with Osborne about any fences or roads.

Q. State what that conversation was.

Mr. DENMAN.—Object to that, on the ground it refers to a matter off this chart, and out of lands considered in this case, therefore is incompetent, irrelevant and immaterial.

Mr. PLATT.—It applies to the policy of the compsnv with reference to the monopoly of these lands.

Mr. DENMAN.—There has been no showing of a monopoly yet.

The COURT.—Whatever part of that conversa-

(Testimony of William Willis.)

tion related to this land I think would be admissible, but I don't want to open the door, unless it is absolutely necessary, to a consideration of conditions elsewhere, except right here.

Mr. PLATT.—(Q.) Can you indicate on the plat whether that conversation referred to any part of the fence as shown upon the plat?

A. I think not, no, sir. I think that first conversation related to a fence that was around here further (indicates) wherever the Ranch house is; if the Ranch house is there the fence would be off here.

Mr. DENMAN.—That is, off the southwest end of the map?

A. If I have got the map right.

Mr. PLATT.—(Q.) To what road did that conversation refer?

A. Related to this Squaw Valley—Golconda road.

The COURT.—Gentlemen, I think the easiest way would be to take the conversation, and then it can be stricken out, if necessary.

Mr. DENMAN.—(Q.) But it does refer to a portion of the road not on this map?

A. Yes. [193]

The COURT.—If it refers to any portion of the road on the map, that part of it I will admit, but I think the only safe way to do is to hear the testimony, and then strike out that which is not relevant.

Mr. PLATT.—Let us have the conversation then.

A. I went down and saw Mr. Osborne, and asked him to remove the fence that he placed across this road, and had fenced in a portion of the road, prob-

(Testimony of William Willis.)

ably, as near as I remember, about a half a mile of the old travelled road, and thrown the road up in the foothills. He had run a drag, or something of that kind, over the outside of the fence, and just took the rough sagebrush off, and the road was very badly travelled, and I wanted to have the fence taken off. There was no gates on this portion where the road was fenced in, and he said that it was on the company ground, and he would not remove the fence.

Mr. PLATT.—(Q.) Are you giving us the exact language?

A. That is as near as I can remember. That is just as near as I can remember his exact language.

Mr. DENMAN.—I move to strike out the conversation on the ground it is incompetent, irrelevant and immaterial, and not applying to any of the issues in this case; not showing any policy, other than they wanted to shift the road off their own land onto an adjoining piece of Government land.

Mr. PLATT.—I submit it is competent to show the tendencies of this company as to fencing off public highways, and keeping the community off public highways, and off their lands and Government lands adjacent thereto.

The COURT.—It don't seem to me that relates to this particular tract of land.

Mr. PLATT.—I expect to connect this up with another conversation that Mr. Willis had with Mr. Osborne; if I remember what [194] the facts are, concerning a portion of the fence near the dam, which is a succeeding conversation to this conversation, to

(Testimony of William Willis.)

which Mr. Willis has just testified. A conversation between the same people.

Mr. LEWERS.—May I inquire whether the second conversation you propose to ask about was a conversation whereby any effort was made to fence in a road which ran across Government land, or was it a piece of road which was on the land?

Mr. PLATT.—A piece of road which ran across their land upon Government land.

The COURT.—I am still of the same impression I was, but I will allow you to go on and put in your other testimony.

Mr. PLATT.—(Q.) Did you have any conversation with Mr. Osborne?

A. After this first one?

Q. Yes. A. Later on I did.

Q. And where did you have that conversation?

A. At the Ranch house, and on the road between the Ranch house and the crossing of Rock Creek.

Q. Was that conversation at or near the land or fence in question, as exhibited upon the plat?

A. A part of it was, yes; we were right at the Rock Creek crossing, where the road crosses Rock Creek, and through his,—well, there was two fences there, there was two gates.

Q. I wish you would indicate upon the plat just where the conversation occurred.

A. The second conversation took place along in here (indicates on plat); we were in the machine; this is the road, I believe, from Tuscarora to Midas and Golconda and the Squaw Valley Ranch, and we

(Testimony of William Willis.)

crossed Rock Creek running from the Ranch up this way, and crossed Rock Creek, I should judge a quarter of a mile from the end of the fence, there was a fence corner there, turned there and came back; and the second conversation [195] occurred between the Ranch house and this point, I should judge it would be somewhere in here (indicates on plat).

Q. Was that conversation concerning any part or portion of the fence indicated there upon the map?

A. It was.

Q. What was that conversation?

A. Well, the conversation was to decide on what to do about the gates across the road; on either side of Rock Creek there were two gates, one on either side of Rock Creek, and Mr. Osborne and Mr. Webb, who was there at the time, agreed to take those two gates down, and put a lane, or put a fence on either side, and make a lane along between where the two gates stood.

Q. I wish you would state as nearly as you can, the exact language that Mr. Osborne used during that conversation.

A. I think that was during the first conversation.

Q. During the first one?

A. During the first conversation about the other portion of the fence.

Q. What was that?

Mr. DENMAN.—By the other portion of the fence you mean what?

A. This other fence; this fence opposite, close to the Ranch house.

(Testimony of William Willis.)

The COURT.—(Q.) That is where he wanted to change the road from their land to the Government land?

A. That is where they had changed the road; they had fenced that part of the road in.

The COURT.—I think I will exclude that conversation.

Mr. PLATT.—If the Court please, it seems to me if the superintendent of a company makes a declaration to a county official that he will do thus and so in the event anybody interferes at all with the fences of the Golconda Cattle Company, and makes a statement so comprehensive that it must include all the fences [196] owned by that company, it seems to me that such testimony should not be restricted because the particular fence was not mentioned in the conversation, or because the conversation did not take place upon the line of the particular fence.

The COURT.—(After discussion by counsel.) (Q.) Mr. Willis, during that first conversation, were you discussing this new road that he had built?

A. Yes.

Q. That was all you were discussing?

A. That was all at that time.

Q. And were you intimating that the county would have to compel them to take that fence away?

A. Yes, sir.

The COURT.—I think I will exclude the conversation.

Mr. PLATT.—(Q.) You started in to narrate a conversation which you had along the line of the

(Testimony of William Willis.)

fence as shown upon the plat; now what was the extent of that conversation?

Mr. LEWERS.—I submit that has been answered; he has testified to what was said about removing the gates; and Mr. Platt then asked whether certain language was used.

The COURT.—(Q.) Have you detailed the whole of that second conversation about the lane crossing the territory between the two creeks, Willow Creek and Rock Creek.

A. No I have not. There was considerable conversation from the Ranch house up, which was all included; it was mixed up together, about the lower fence where the road had been thrown out, and also about these gates across Rock Creek; it was a general conversation.

The COURT.—Give us the conversation about the Rock Creek gates.

Mr. PLATT.—I forgot it, but will your Honor give me an exception to the ruling of the Court on the last objection?

The COURT.—Certainly. [197]

A. There was scarcely any conversation at all. I met Mr. Webb in Elko, and the purpose was to go over there and fix things to suit the county; he asked me to come over and point out what we wanted done, and he would meet me in the machine at the Ranch house, and go out. We did, and I pointed out what we wanted done, and he said he would take the gates off—Mr. Osborne was in the machine—that they would take the gates off, and put a fence up on either

(Testimony of William Willis.)

side, and make a lane of this crossing, the Rock Creek crossing. And the others would relate to the other road; that was all that related to the gates across Rock Creek. They took the gates off, and we had no further trouble.

Mr. PLATT.—(Q.) Did you ever have any conversation about any other gate upon any of these lands shown upon the plat?

A. No, never had any conversation with them about any other gate; I took the other gate off myself without any conversation.

Q. Where did you take the other gate off?

A. Well, the other gate would be about, I think it is about four miles above the reservoir in the Tuscarora direction that is just making a rough guess at it; it would be right where the road came out of the hills onto Willow Creek, or somewheres near there.

Q. About when did you take the gate off?

A. That would be in 1910, in October, 1910.

Q. And was the gate placed relatively across the road? A. The gate was directly across the road.

Q. Directly across the road?

A. Yes; that is, it may have been—it was a large gate, and as I remember now the road ran very close, the wagon tracks ran very close to one post, leaving quite a space of ground on the other side, between the other post.

Q. State what you did in taking the gate off.

A. Well, I had another one of the Commissioners along with me, and when we drove down from Tusca-

(Testimony of William Willis.)

rorra, that is the first I had [198] known of any gate being across that portion of the road; the gate was closed, and there was a chain around it with a padlock through the links of the chain, but it was not locked; there was a notice, big notice, "Shut the gate." Well, we had been having this trouble, so I said to Mr. Moody, who was the other Commissioner, we will stop here and take that gate off, and put it up alongside of the posts; it took us about an hour to get the gate off and moved, a big heavy gate; but we got it off, and drove through, and didn't close the gate afterward.

Q. Did you ever have a conversation with Mr. Osborne about that gate afterward?

A. Never had any conversation with any of the men over there about that gate.

Q. Was there any other entrance into the field very near there, except through that gate?

A. Well, you could get in there, yes. As I remember it now, the wires were not connected up to the gate-posts.

Q. At that time?

A. At that time; the wires were down on either side, on both sides, I think.

Q. As I understand it, the posts were built for the purpose of putting the wires up?

A. The posts had been set there, but the wires had not been strung on the posts yet; but to get through there you would have to drive out in the sagebrush, off of the road, to get through. Now, I may be mistaken about that, there may have been wires come

(Testimony of William Willis.)

up on one side, but as I recollect it, I don't think that the wires connected with either gate-post.

Q. You don't remember whether that was in September or October of 1910, do you?

A. It was October, I am pretty sure.

Mr. PLATT.—That is all. [199]

Cross-examination.

Mr. LEWERS.—(Q.) That was during the campaign? A. Yes.

Q. Mr. Moody and you were out campaigning, weren't you? A. Yes, sir.

Q. And have you been at that point since?

A. Yes.

Q. There is an opening of about a half a mile there, isn't there?

A. The last time I was there there was some posts, that is all I saw.

Q. When was that?

A. I was over there, I think, last October, the last time I have been there.

Q. October, 1911? A. Yes.

Q. You mean there were some posts at the place where the gate had been?

A. Where the gate had been.

Q. There was no gate there?

A. No, I didn't notice any gate.

Q. Did you notice any fence there?

A. I didn't notice any fence; I noticed things had been torn down, and the wire taken off; when I got down a little further I found a fence alongside of the road, which was new to me, down beyond the reservoir.

(Testimony of William Willis.)

Q. The road down there beyond the reservoir was changed, was it not, as the result of a petition which was filed to make the change?

A. It was changed below the reservoir.

Q. The Board of County Commissioners granted that permission on application, didn't you?

A. Yes.

Q. When you drove down there, did you drive over to Midas on that occasion?

A. Yes, I went over to Midas.

Q. Did you go through any gates in doing so?

A. No, didn't go through no gates.

Q. The road was open all the way through?

A. The road was open all the way through, with the exception of one place down by the Ranch house, that was not included in this fence, I believe. [200]

Q. Did Mr. Webb fulfill his promise with reference to that lane down at the lower end?

Mr. PLATT.—Object, if the Court please, on the ground there is no testimony here showing that Mr. Webb made any promise, and even if there were any testimony it would be incompetent, irrelevant and immaterial. It has not been shown that Mr. Webb was a representative of the company, or had any authority to act for the company.

The COURT.—I suppose the only thing you want is the fact, whether he went through a lane crossing the premises, and that would be perfectly relevant, the condition of that road, as it crosses the territory in question here, and whether he went through a lane or not. It is not shown that Mr. Webb was an

(Testimony of William Willis.)

official of the company, is it?

Mr. LEWERS.—No. The statement was made that Mr. Webb, in the presence of Mr. Osborne, promised to take down the gates, and put the fence along the line. (Q.) Was that done immediately afterwards?

A. It was done before I went over the next time. The gates were taken down when I was there the following spring, the wires were strung on both sides of the road, making a lane there.

Q. There was a lane running through there then, without any gate? A. Yes.

Q. Do you know who Mr. Webb was?

A. I knew he was connected with the company. I didn't know what position he held.

Q. He appeared before the Board of Commissioners in Elko in connection with that matter?

A. No, he didn't appear before the Board.

Mr. PLATT.—We object to that as improper cross-examination. If I may be permitted to introduce testimony of the complaints [201] that came to the Board of County Commissioners, I have no objection to permitting counsel to examine along that line.

Mr. LEWERS.—It is merely to ascertain whether Mr. Webb had anything to do with the matter prior to the conversation on the ground.

The COURT.—I think I will sustain the objection.

Mr. LEWERS.—That is all.

Mr. PLATT.—That is all.

By the COURT.—(Q.) Mr. Willis, did you pass

(Testimony of William Willis.)

through a lane from Willow Creek to Rock Creek, the whole distance? A. No, sir.

Q. How much of that distance was covered with the lane?

A. Oh, I don't think there was over, well, not over three-quarters of a mile. The lane started, began there close to Rock Creek, on the west side of Rock Creek, and it ran towards Willow Creek, but just for a short distance, might not have been a half a mile.

Mr. LEWERS.—There is another question we might straighten out in connection with that lane matter. (Q.) On the other side below the Willow Creek dam, the last time you went through there, there was another short lane, was there not?

A. No, the lane was on the outside of that fence.

Q. Where the road turns to go on the outside of that fence, was there the last time you went through there, any lane there? A. No lane there at all.

Q. What sort of an opening was there there?

A. There was no fence to go through, the fence was on the right.

Q. The question I want to get at is this—

Mr. PLATT.—I would like to have the last answer read.

(The reporter reads the record.)

WITNESS.—You asked me just below the dam?

Mr. LEWERS.—Yes, just below the dam. [202]

Mr. PLATT.—(Q.) As I understand, there was no opening in the fence there?

A. Oh, yes, there were gates there; but on petition they had changed the road, and put it outside. If

(Testimony of William Willis.)

I had followed the old road, I would have had to have gone through these gates, but we granted the petition to put the road on the outside of that, on the outside of the fence; and there was a road inside of the fence, where they had been hauling in supplies up to the dam.

Q. Then the main road, as I understand it, was not running through the fence?

A. No, the new road was on the outside of the fence.

Mr. LEWERS.—I suggest that I be allowed to examine the witness.

Mr. PLATT.—I interrupted for the purpose of trying to straighten the witness out.

Mr. LEWERS.—(Q.) In coming from Midas, or from Tuscarora, I understand you crossed Rock Creek through a lane? A. Yes.

Q. Somewhere from a quarter to half a mile long?

A. Somewhere.

Q. A short lane? A. A short lane.

Q. After you got beyond that, you followed the Tuscarora road until you got pretty near up to Willow Creek dam? A. Yes.

Q. In any portion of that were you within a lane, or were you in open country?

A. That was all open country, as far as I could see from the road.

Q. When you got up here pretty near to the dam, I understood you to say that the old road ran up inside the fence? A. The old wagon road did, yes.

Q. But that permission had been granted by the

(Testimony of William Willis.)

Board of Commissioners to move that road to the outside of the fence at that point? A. Yes. [203]

Q. And when you went there the last time you drove to the outside and went up the new road, did you? A. Went up the new road all the way.

Q. Without any obstruction of any kind?

A. No obstruction at all.

Mr. LEWERS.—That is all.

Mr. PLATT.—(Q.) There was no obstruction because the new road was on the outside of the fence, wasn't it? A. Yes.

Mr. PLATT.—That is all. [204]

[**Testimony of E. C. McClellan, for the Plaintiff.**]

E. C. McCLELLAN, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. What is your full name?

A. Edward C. McClellan.

Q. Where do you live? A. Elko, Nevada.

Q. What is your profession or occupation?

A. Surveyor.

Q. How long have you been engaged in that?

A. Thirty-four years.

Q. Are you acquainted with what is known as the Squaw Valley Ranch of the Golconda Cattle Company? A. Tolerably well acquainted with it.

Q. When did you first become acquainted with it?

A. I became acquainted with it in travelling through the valley in 1884, I think it was, the first time.

(Testimony of E. C. McClellan.)

Q. Had you any association with the property in the capacity of a surveyor? A. No, sir, never.

Q. Had you occasion at any time to examine any part or portion of the company's fences in connection with any employment there by the company or anybody else? A. I did.

Q. When was that? A. In 1910.

Q. About what month, if you remember?

A. I think it was about July or August, but I cannot remember the exact time, and I have not my note-books here in regard to the work.

Q. By whom were you employed?

A. By George Russell Company.

Q. What part or portion of the fence of the Golconda Cattle Company engaged your attention at that time?

A. Along the south side of Willow Creek, above the reservoir a few miles, and along the east side of Siawappe Creek.

Q. Have you had occasion yet to examine Government's Exhibit No. 1?

A. I glanced at it yesterday noon, but I didn't examine [205] it very closely.

Q. Will you kindly look at that plat, and ascertain whether you can designate the portion of the fence which engaged your attention.

A. The portion that engaged my attention positively was the line fence between the George Russell land and the Golconda Company's land, or that was supposed to be between the two tracts of land; that was commencing at a point in the south half of sec-

(Testimony of E. C. McClellan.)

tion 29, and extending to the northeast corner of section 17, in township 39 north, range 49 east.

Q. Did you make an actual survey of that land?

A. I did across those places; that is, from the south side of 29 to the northeast corner of 17; I made a resurvey of that.

Q. To what did you tie?

A. I tied to the quarter section corners between 17 and 20, and between 29 and 30. I looked for the northeast corner of section 17, but did not find it. In tying or finding the quarter section corner between 29 and 32, it was necessary for me to retrace the Government survey from the corner to 1, 2, 35, 36 in townships 38 and 39 north, range 48 east.

Q. Can you state whether or not that portion of the map to which you have pointed is an accurate representation of the fence at that particular place?

A. It seems to be very nearly as I found it when I was there.

Q. I call your attention, Mr. McClellan, to a portion of the fence from a point on the intersecting line in the north half of section 20, township 40 north, range 49 east, extending up to a point at the intersection of Nelson's fence, and will ask you at the time that you made the survey, whether there was in fact a fence at that place, or between those points?

A. There was a fence from the point you speak of in section 20 to a point about a quarter of a mile south of the northeast corner [206] of section 17, the posts were up and the wires stretched; from that point on up to its connection with the Nelson fence,

(Testimony of E. C. McClellan.)

posts were set, but no wires stretched; the men were working stretching the wire the day I was there.

Q. As I understand it, a part of that was up, and part had not been completed?

A. Yes, sir, about $\frac{2}{3}$ of it was up.

Q. I call your attention to that portion of the black line on this plat from a point right between section 31 and 32, and extending relatively to a point in the southern half of section 36, and I will ask you whether there was a fence constructed there or not?

A. Yes, sir.

Q. At its full length between those points?

A. There was one little space there of a few hundred yards that I didn't see, but the balance of the distance along the fence I saw, and it was up.

Q. At that time, Mr. McClellan, did you make any general observation as to the condition of the fences of the Golconda Cattle Company?

A. Only in so far as the fence was upon the Russell land.

Q. Had you at that time any conversation with any representatives of the Golconda Cattle Company? A. No, sir.

Q. Did you make an investigation to ascertain whether any part or portion of the fence of the Golconda Cattle Company at that time was on Government land or not? A. No, sir.

Q. Do you know, as a matter of fact, whether you observed any?

Mr. DENMAN.—Object to that as calling for a conclusion of the witness, as to whether or not the

(Testimony of E. C. McClellan.)

land was Government land. There has been no showing of title here.

The COURT.—If he knows, he can answer; if he does not know, he need not answer.

Mr. DENMAN.—It calls for a conclusion. [207]

A. I can tell about where the fence line was in connection with the Government lines as I found them, but whether the land was Government land or private land, I do not know.

Mr. PLATT.—(Q.) I wish you would indicate upon the plat.

A. The fence line was a nearly east and west line, was somewhere about a quarter of a mile, or less, north of the township line between townships 38 and 39 north, in ranges 48 and 49 east, as far as I went. That is, in running from my starting-point on the west side of Willow Creek, the corner to sections 1, 2, 35 and 36, I ran two miles easterly on the township line, and for a mile and a half, about, I could see the fence to the north of me, the posts standing, and the wire stretched on the fence. About that point the fence turned to the northeasterly; I continued east half a mile farther, and there was a short distance that the fence was out of my sight entirely. From that point I ran north between sections 31 and 32, and came in sight of the fence again, crossing it at the quarter section point between sections 31 and 32, there the fence was bearing about northeast and southwest. There was a short space there, from that quarter section corner southwesterly, that I didn't see the fence, but before that and after that, I was

(Testimony of E. C. McClellan.)

within sight of the fence all the way.

Mr. PLATT.—That is all.

Cross-examination.

Mr. DENMAN.—(Q.) You don't know what openings there were in that fence in the part you didn't see? A. No, sir.

Q. Now, let me ask you, you are familiar with the territory in there, aren't you, in that neighborhood?

A. Yes, sir.

Q. Where do the cattle come into that country that are working north in the springtime from the country to the south? [208]

Mr. PLATT.—Object on the ground it is improper cross-examination.

Mr. DENMAN.—Well, I will take the witness then.

The COURT.—You make this your examination in chief, then?

Mr. DENMAN.—Yes, if there is any question about it.

A. The cattle would drift in—

Mr. PLATT.—I would like to have the question read.

(The reporter reads the question.)

Mr. PLATT.—Object to the question on the ground it has not been shown that this witness has any knowledge of any cattle, or their tendencies, or where they cross. And upon the second ground, if the Court please, that the time of the crossing of the cattle has not been specified in the question.

Mr. DENMAN.—Spring.

(Testimony of E. C. McClellan.)

Q. How many times have you been through that country?

A. Oh, I have been through that country a great many times; I could not state exactly, but between 1884 and last year, a dozen or 15 times.

Q. Are you familiar with the topography of the country in general? A. Yes, sir.

Q. Have you seen the cattle working through that country? A. I have.

Q. How many years have you lived in Nevada?

A. Forty-two years; nearly 43.

Q. In what capacity?

A. Well, I came here as a boy, and I worked on my father's ranch, he had a stock ranch near Reno, and I worked until I started surveying, and I have been in a surveying capacity ever since.

Q. Cattle ranches?

A. Principally cattle ranches.

Q. Laying out fences?

A. Laying out fences, and selecting land for cattlemen.

Q. Designing pasturage, and— [209]

Mr. PLATT.—I think we have had enough leading questions.

The COURT.—This is preliminary.

Mr. DENMAN.—(Q.) Are you sufficiently familiar with this country to tell the general movement of cattle? A. I am.

Mr. PLATT.—Object to that, and ask the answer be stricken out, on the ground the question calls for a conclusion as to his familiarity.

(Testimony of E. C. McClellan.)

Mr. DENMAN.—He said he had been in there a dozen or 15 times, knew the topography of the country, and the cattle moving in there.

The COURT.—I will allow the question.

Mr. PLATT.—Note an exception.

Mr. DENMAN.—(Q.) Can you tell me through what portion of the country south of this general map here, the cattle coming from the south in the spring-time would naturally pass in, working up to the higher country beyond; where would they come up?

A. They would come up—

Mr. PLATT.—Object to the question on the ground it calls for a conclusion or opinion of the witness.

Mr. DENMAN.—That is very true, but it is an opinion of a man who knows the topography of the country, the same as we have in maritime practice.

The COURT.—(Q.) Do you know, Mr. McClellan? A. Yes, sir.

The COURT.—I will overrule the objection.

Mr. PLATT.—Exception, if the Court please, on the grounds stated in the objection.

The COURT.—Let the exception be entered.

A. They would come up and strike Willow Creek, between Hot Creek and the point where the creek turns to the north, principally at the point where it turns to the north, and where the road shows, I suppose that is the road—no, it is not—but there is a road that runs in and drops onto the creek, just below the northeast [210] of the quarter section

(Testimony of E. C. McClellan.)

corner, they would come right in that strip of country there for about three miles.

Q. What can you say as to the topography of the country right about this space near Opening No. 6, and to the south generally, with reference to its being a valley or precipitous, or what it is?

A. Well, that is valley land there. Opening 6, that is right on the valley, it is right in the valley.

Q. And is that a place where cattle would naturally congregate? A. That is a watering place.

Mr. PLATT.—The same objection.

Mr. DENMAN.—(Q.) And from there where would the cattle work?

The COURT.—The objection is overruled. You may have the exception.

A. They would work, some of them up the creek, some would cross the creek and work up on north, to the west of the creek.

Q. What is the natural trend of the cattle in the springtime with reference to direction of travel?

Mr. PLATT.—Same objection.

The COURT.—Same ruling and same exception.

Mr. DENMAN.—(Q.) The cattle that are in Humboldt, Humboldt Valley?

A. The trend is to the north.

Q. Now, can you tell us in general what the topography of the country is around Toejam Mountain? Have you been up into that section there?

A. I have been all over that country.

Q. What, in general, can you say of the country to the northeast of a line drawn from North's fence to Nelson's fence?

(Testimony of E. C. McClellan.)

A. I don't know where North's fence is, unless it shows on the map. I have never been over there since that fence was constructed, and I have never been over to the Nelson fence, and the south line of that fence, where it extends to the northwest, never been exactly to that fence, but I can give you a general idea of the [211] country through there.

Q. Well, what is the character of the country?

A. It is a high table-land country. On the north side of Siawappe Creek, as it is now called, and from there over to the south fork of Rock Creek, that is called Toejam Creek, there is a high ridge, reasonably smooth, grassy table-land, all ridge, the mountain itself, that is, the main mountain, lies about 3 or 4 miles east of there.

Q. Good grazing country? A. Splendid.

Mr. DENMAN.—That is all. Take the witness.

Redirect Examination.

Mr. PLATT.—(Q.) Have you ever been up in the country indicated on the plat as Toejam Mountain?

A. Yes.

Q. What is the condition of the country?

A. That is the country I was speaking of. That that is marked as "Toejam Mountain" is a ridge lying between Toejam Creek and Siawappe Creek, that extends easterly and westerly, bearing a little bit south of west.

Q. How high is the ridge?

A. Oh, I should judge from the Siawappe Creek up to the summit, it must be a good thousand feet high. It is a mile and a half, I think, from the creek

(Testimony of E. C. McClellan.)

to the top of the ridge.

Q. It would not be a natural place for cattle to graze over, would it?

A. It is all fine grazing land there; they do graze over it.

Q. Is it a natural course for them to take, and graze over it?

A. Yes, that is the course they take when they get up in there and graze around, or would if allowed to do as they please, graze around Siawappe Creek, cross along the north side of that creek [212] and drop over onto Rock Creek, and Toejam Creek, as it is called.

Q. You say they would graze there if they ever got up there?

A. They get there; I have seen them there.

Q. Is it a natural place for cattle, a natural trail for them?

A. Not exactly a natural trail; they are on the summer range when they get up in there.

Q. Which direction do they come?

A. From the south.

Q. Always from the south?

A. Some come from the southwest, or from Squaw Valley, the cattle that belong to the Squaw Valley outfit would naturally come from a west or southwesterly course; cattle that come from other people on the Humboldt, they would come from the south; they come up Antelope Creek to Boulder Creek, into that country.

Q. You never heard of any cattle coming from the

(Testimony of E. C. McClellan.)

northeast over the mountain, did you? A. No, sir.

Q. And you are very familiar with that country, aren't you? A. I am.

Q. It would not be a natural course for them to take, would it?

A. Yes, the cattle that are to the northeast, over in Independence Valley, don't cross that high mountain unless they are driven across, or forced across through lack of food.

Q. They would have to be driven or forced in some way?

A. They come over the mountain that lies about 4 miles east of this country.

Q. In other words, as I understand your testimony, it would be comparatively easy for cattle to get out of this so-called inclosure up over the mountain, but it would be very difficult for cattle to get in, coming from the northeast?

A. Well, of course, that inclosure, I don't know where it extends; if the North fence extends across to this point (indicates) and the Nelson fence connects there, they could not get down from [213] the northeast; they could not come in there at all; they would be effectually barred.

Q. By the fence?

A. By the fence, yes. But if there is no long fence, this being a smooth ridge, well grassed, unless they are kept out by persons driving them off, or by sheep keeping them off of there, they can drift down that way in the fall of the year, or used to when I was there. The last 10 or 15 years I have not been up

(Testimony of E. C. McClellan.)

there in the fall, but before that I have been there in the fall of the year, and I know the cattle drifted down through there, all through that country, drifted down to the southwest.

Q. Didn't you just testify that cattle never came over from the northwest, down the southwest, over the Toejam Mountain, unless they were forced, or unless they were driven?

A. They don't come over that mountain from Independence Valley, but these cattle that drift in the spring of the year, and drift to the north, in the fall they drift back south, and then they come over and practically retrace their steps to the high mountain, and the best of the grass, you might say the finest grass, is farther east than north, or northeast from this place.

Mr. DENMAN.—That is, you mean—

A. Off of this map.

Mr. PLATT.—(Q.) I would like to have you explain your answer when you stated that cattle coming from the northeast, and going in a southwesterly direction over the Toejam Mountain, never in your experience, and within your knowledge, had come over that mountain from the northeast, going southwest, unless they had been forced or driven, or unless, I think you said, they were not getting much to eat, or words to that effect. A. I did not say that at all.

Mr. LEWERS.—I was going to object; it was a misstatement of [214] the witness' testimony, but the witness understands it.

A. What is marked on this map as the Toejam

(Testimony of E. C. McClellan.)

Mountain is a ridge laying between the south fork of Rock Creek and Willow Creek; the main mountain itself is several miles to the east of here, that these streams head in; that mountain is running north and south; Rock Creek and Willow Creek head in the same mountain, flowing parallel to each other; but Toejam Creek and Siawappe Creek are two or three miles apart, and flowing there for five or six miles parallel to one another, before you reach this map; then Siawappe Creek turns to the south, and Toejam Creek continues west, and in turning to the south they separate; that is, Siawappe Creek turns south and separates from Rock Creek, and forms the tract of country that is shown on this map. But before they reach the lands shown on this map they have been flowing alongside of each other for several miles. What is called Toejam Mountain, as I have stated, is a ridge between the two creeks, that is perhaps a thousand feet high, a grassy ridge; at one point between the two there is a small lake.

Q. When did you last see that country around Toejam Mountain?

A. I last saw that in 1910, when I was up surveying for the George Russell Company.

Q. During that year or the year 1911, did you see any cattle go over the part of the country indicated on the plat as Toejam Mountain?

A. No, I didn't see any cattle going over there; I was only there one day, or two days, within sight, you might say, of that ridge. One day I retraced this line, located a fence line; another day I came in from

(Testimony of E. C. McClellan.)

the southeast, and caught the Nelson fence, and re-traced that fence about five miles east, and then north-easterly to the summit of the mountain.

Q. Have you any familiarity, Mr. McClellan, with the portion of the country near the western line of the map? [215]

A. Only as I was over it, I think, in 1884, was pretty near the last time I was over it.

Q. Had you been over it before that time, more or less?

A. Simply travelling over it with a team on the road.

Q. Do you know anything about cattle travelling from the west easterly across that country?

A. When I was there the cattle travelling from the Clover Valley, or Evans Creek in Clover Valley Ranch, and the cattle belonging to the Squaw Valley Company, ranged north and east from Squaw Valley.

Q. Did you ever see cattle migrating across the part indicated upon the plat in white?

A. No, I cannot say I ever saw them migrating across there; I have seen them feeding up there, or seemingly feeding; I have seen them at a distance over here, and I supposed both horses and cattle up there were grazing over the country.

Q. You have seen them many times, have you?

A. Almost every time I have been in that country.

Q. Are you familiar with all migration of cattle from the north in a southerly direction?

A. Well, yes, I have seen and can tell from the

(Testimony of E. C. McClellan.)

trails the cattle running southerly, that is, coming from the mountains up north, they come southerly until they strike Rock Creek, and then they naturally follow the lines of the easiest travel; they follow down Rock Creek; that is, when migrating or travelling, they don't travel across the country from Rock Creek to Willow Creek. The only trail I ever noticed was cattle feeding in there, and when they started to go down to water, formed a trail going down to water; I have never seen any trail that went continuously across.

Q. You never examined the country to find trails?

A. I was not looking for them, no; but I am generally of an observing nature, and if I run across a trail that seems to be very [216] distinct, I generally try to judge what it is made for, what cause.

Q. But as I understand it, you have seen cattle cross many times within this white inclosure?

A. Yes, sir, I have seen cattle crossing in there, and horses. I have seen from a distance sheep in that country, towards the northeastern part of it.

Q. As a matter of fact, what kind of country is that in there?

A. It is a rather high rocky bench land, with scattered sagebrush; some places the sagebrush is rather thick, where it seems as though the soil is better than in other places, and considerable grass.

Q. There is considerable grass there?

A. Yes, sir.

Q. Does it extend pretty generally all over this Government land here? A. Yes, sir.

(Testimony of E. C. McClellan.)

Q. What kind, would you designate it as grazing land?

A. I would designate it as spring grazing land.

Q. Spring grazing land?

A. Yes, sir. The grass is of a character that seems to be very nutritious, and stock like it in the spring. I have been over that ground late in the fall when the grass seemed to have dried up, and a good part of it almost blown away; that is, you would not see that the grass was there; you would have to look pretty close to see that the roots were in there.

Q. But in the spring it seemed, you say, nutritious and plentiful?

A. Good feed there, yes, sir; quite a lot; not as good as further east in the higher table bench, or in the mountains, but still good feed.

Q. Where do the higher lands begin, relatively, within this, or upon the Government land indicated upon the plat?

A. The higher lands begin at the northeast corner on the divide between Siawappe Creek and Toejam Creek; and the ridge or divide [217] is extending towards the northerly part of the tract of land, nearer the Rock Creek side than the Willow Creek side; it has a gentle slope to the south, but the ridge being farther north, it is steeper going to Rock Creek than to Willow Creek; the slope is gentle raising from Rock Creek, and extending up until you get within half a mile or so of Willow Creek, then it is tolerably steep down to the Creek. At the lower end, or southwest end of the tract, the land is quite low as com-

(Testimony of E. C. McClellan.)

pared to the northeast corner.

Q. Is the land tending toward the center of the Government land as shown upon the plat, very much higher than the land along the creeks?

A. Yes, it is considerably higher, several hundred feet.

Q. Several hundred feet? A. Yes, sir.

Q. But it gradually slopes down, as I understand it?

A. It gradually slopes down until you get within a half or quarter of a mile of the creek, then the slope is steeper. Rock Creek on the north is a great deal higher in elevation than Willow Creek to the south, while it is quite a steep slope from Rock Creek up to the top of the ridge as it extends along here, (indicating), then there is a long, gentle slope here for two or three miles before it commences to slope steeper, and that makes a bench in there, with a gradual slope to the south.

Q. And that is true particularly as to the central portion of this?

A. Yes, down in the southwest corner, it is lower and more even, the two creeks are getting more to the same elevation.

Mr. PLATT.—That is all. [218]

Recross-examination.

Mr. DENMAN.—(Q.) You say that the cattle if they came in from the north would naturally range down about this blue line here? A. Yes.

Q. Would not go to the Government land naturally? A. They don't cross there to the south, no.

(Testimony of E. C. McClellan.)

Q. What about the character of the soil in here on these bottoms, in the blue line, say running from North's fence to Opening No. 1; what is the character of that soil?

A. From North's fence to six miles west, the soil is poor, the bottom is very narrow, and it is a washed, gravelly, rocky soil, the same character of soil that the bench land is to the south.

The COURT.—Is that for six miles, you say?

A. About six miles west from North's fence; the valley opens out and the character of the soil changes; it is more of a loamy washed soil from that on down.

Mr. DENMAN.—(Q.) Let me ask you, are you certain as to this, have you been on that recently enough to be certain as to that line running from 36 to 34?

A. The last time I was along in there was, I think, in 1885.

Q. In 1885?

A. But I am certain enough of it to say yes. It is a narrow bottom of soil along there, right in the bottom itself is all right, that is good soil, but it is a narrow bottom, it is not very wide.

Q. Well, a quarter of a mile?

A. Well, a quarter of a mile would cover it, some places might be a little bit wider, but not very much.

Q. In that actual bottom the soil is good?

A. Oh, the soil is all right on the bottom. On Willow Creek, from the junction of Siawappe Creek and the main Willow Creek, on [219] down, there is a good soil on down to its junction with Rock Creek.

(Testimony of E. C. McClellan.)

Q. In this territory there between this fence running west six miles, you say the rich soil is confined about a quarter of a mile in the bottom? A. Yes.

Q. But outside of that, is that gravelly soil?

A. Outside of that is this gravelly wash soil.

Q. Do you know who ranges sheep in this country here, in this Government territory here?

Mr. PLATT.—Well, if the Court please, I object to the question, because it does not state any definite time; I don't know whether he means ranges them now, or 20 years ago.

Mr. DENMAN.—(Q.) You said you saw sheep ranging in here, in response to Mr. Platt's question?

A. Yes.

Q. Whose sheep did you see in there?

A. I was informed they were Tom Nelson's sheep.

Mr. PLATT.—I ask the answer be stricken out on the ground it is hearsay.

Mr. DENMAN.—We consent. That is all.

Mr. PLATT.—That is all.

By the COURT.—(Q.) What is the average width of the bottom along Willow Creek?

A. For the first four miles from its junction Willow Creek and Siawappe Creek, the bottom will average between a quarter and a half a mile; below that it broadens out; it is a good half mile, half to three-quarters of a mile wide, for about three miles; it narrows down into a canyon then for two or three miles, and I believe the average width would be less than a quarter of a mile. After that it broadens out, and widens from a quarter of a mile in width to three-

(Testimony of E. C. McClellan.)

quarters of a mile or a mile, down towards Squaw Valley, gradually opening out into Squaw Valley itself. [220]

Q. I wish you would go down Rock Creek the same way.

A. Rock Creek for the first six miles from the North fence, will average perhaps a quarter of a mile, well, it may average a quarter of a mile, it will be a short quarter of a mile; it won't average that, I don't believe, less than a quarter of a mile; then it widens out, the creek follows the line of bluffs on the south or southeast side of the creek, and on the opposite the slope is very gradual to the northwest and north; and for about four miles it is gradually opening out into Squaw Valley. The width of the bottom is a half a mile or more, then it opens into Squaw Valley proper, and it is hard to tell what the original width of the bottom itself is, but I think pretty near a mile along there. It has been all put under cultivation and irrigation through there, and a person would have to look closely to find where the original bottom ended and the slight slope up began of the cultivated land.

Q. What is the course of the Toejam ridge?

A. The Toejam ridge course is easterly and westerly.

Q. Due east and west?

A. Almost due east and west; from the northeast corner of this plat it extends nearly due east between those two creeks, for pretty near from four to five miles. Upon this tract shown on the plat, from the

(Testimony of E. C. McClellan.)

northeast corner it is bearing more to the south of west, gradually turning, until the ridge is running almost due southwest; that is, it is turning from the northeast corner, extending along the north side of the tract in a southerly direction, and then running southwest, gradually running out to nothing, where it strikes Squaw Valley.

Q. Did I understand the top of the ridge on the northeast corner of the map is smooth?

A. Yes, sir, smooth, of course there are rocks there, a rocky ridge.

Q. Would it be passable for wagons? [221]

A. Well, it is pretty steep, I suppose a person if they had teams enough could pull up the ridge, but it is a tolerably steep ridge to get up from the creek up there. By starting out lower down, out on Siawappe Creek, you might say about a mile to the southwest of the Nelson fence, you may work up there, and get on top of that bench, and then follow the ridge right up and strike Willow Creek below there, and work up this bench land, and go right up there, until you strike the mountain, that is about four miles east of the land shown on this plat.

Q. There is another mark on the map below Toejam, and I think it is marked as a barrier; do you know anything about that?

A. That is a point where the canyon is narrow, and it is a pretty steep rocky bluff to go down, to get down onto the creek from the south. Yes, I have been along there.

Q. Would cattle naturally go over it?

(Testimony of E. C. McClellan.)

A. No, they would either drift a little farther east, and drop down where it is not rocky, or else they would drift to the west and come onto the creek below.

Q. Do I understand you that in crossing the Toejam Mountain, or ridge rather, between the two creeks, that cattle would go directly north across there, or would they go to the northwest, and get on the ridge, and then walk up the ridge?

A. The natural way for them to drift, if they were heading for the north, positively with the idea of getting there, would be to go to the northwest, and then bear off to the northeast or northerly, or westerly.

Q. Follow the ridge up?

A. Yes, follow the ridge up. That would be the natural way they would do; but generally cattle, particularly when they are moving, after they get upon a range they are not travelling very much, except as they feed; they are [222] travelling to water, to perhaps a little distance, until they get back to the feed, and then they work back and forth all over the country, without travelling, you might say; but of course take it in the fall of the year when they have been watering up on Siawappe Creek and feeding on the hillsides, they gradually work up, they would travel then from the creek clear to the top of the ridge to where the feed was, if they had eaten the feed off below, then come back to the creek to water.

The COURT.—That is all.

Mr. PLATT.—(Q.) Mr. McClellan, if this line beginning at a point near the end of Nelson's fence, and

(Testimony of E. C. McClellan.)

extending up and around the place on Toejam Mountain, the red line, if that represented a fence, it would prevent the cattle, wouldn't it, from going up and going across Toejam Mountain, to that extent?

Mr. DENMAN.—To what extent?

Mr. PLATT.—To the extent that the fence would be an obstruction.

A. Of course they would not cross the fence.

Q. They could not get into certain sections of Toejam Mountain, which you testified were passable, could they?

A. Not so far as the fence was concerned, no.

Q. In other words, your testimony, as I understand it, was based on the natural trend of cattle, in the event there were no obstructions in their way?

A. Yes.

Q. But you did not testify regarding any possible fences that were built to prevent the cattle going up that way?

A. No, because of my personal knowledge I don't know of the fences being there.

Mr. PLATT.—I want to make your testimony clear.

Mr. DENMAN.—Now to make it clearer: Presume this red fence extending from Nelson's black fence in 9, of township 39 north, [223] range 49 east, from 9 into 8 and 5, from 4, and then running up to the point of the arrow, the easterly point of the arrow, and then running easterly to Toejam Mountain, suppose that fence were there, would that in any way interfere with the general route of cattle moving from

(Testimony of E. C. McClellan.)

the south in this Government land here into this Toejam country beyond?

A. Well, I have got to have a little enlightenment about what you have got down there as the Toejam Mountain. The ridge that lays between Toejam Creek and Siawappe Creek, I suppose this is supposed to be Siawappe Creek, that ridge extends easterly and westerly; a fence line running along the township line on the north line of 4 and 3, would naturally strike the top of that ridge, it would continue along the side of the ridge a short distance above the north of the creek, if that is Siawappe Creek, I don't know, not having my own plats here, I don't know whether that is intended to be Siawappe Creek or not.

Q. As I understand it, you make this thing called Toejam Mountain a ridge, and Toejam Mountain itself, 4 miles to the east?

A. There is no Toejam Mountain I know of. This Toejam ridge might be called the mountain; the mountain itself is several miles to the east. I really cannot tell you the name of that mountain unless it is Independence; Mount Blitzen is on a part of the ranch just west of Tuscarora Valley.

Q. Take this space here, Opening No. 5, marked by the arrow, and through that space and running up what is called Toejam Mountain towards the easterly, would cattle have any difficulty moving over the Government land through that opening? A. No, sir.

[224]

Mr. DENMAN.—That is all.

(Testimony of J. W. Melrose.)

Mr. PLATT.—That is all.

(Court adjourns until Friday, March 8th, 1912, at 10 A. M.)

Friday, March 8th, 1912, 10 A. M.

[**Testimony of J. W. Melrose, for the Plaintiff.**]

J. W. MELROSE, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name, Mr. Melrose.

A. James W.

Q. Where do you live?

A. My home is in Denver, Colorado.

Q. What is your occupation, profession or business?

A. At the present time I am a Government employee.

Q. In what capacity?

A. Special Agent of the Department of Justice.

Q. State what your employment was prior to that time. [225]

A. In various engagements, farming and stock-raising chiefly.

Q. For how long were you engaged in the business of farming and stock-raising?

A. I was raised on a farm and been in the business ever since.

Q. Have you ever occupied any other official position with the Government?

A. I have been a forest ranger.

(Testimony of J. W. Melrose.)

Q. During what period of time?

A. 1905, 1906, and a portion of 1907.

Q. And how long have you been engaged with the Department of Justice as a special agent?

A. Since July, 1907.

Q. From that time up to the present continuously?

A. Yes, sir.

Q. Are you acquainted with the land known as the Squaw Valley Ranch of the Golconda Cattle Company, situated in Elko County?

A. I spent two days in going over the land, the only time I have ever been over it.

Q. I call your attention to the plat upon the blackboard, Government's Exhibit No. 1, and will ask you to examine it and state whether or not that is the land to which you refer. A. Yes, sir, that is the land.

Q. What is the general condition as to character of the land represented in the white within the so-called inclosure?

Mr. DENMAN.—Object to the question; it is not shown that he ever was on that land; he has been in that direction, but as to his presence on this area of Government land, I am quite certain that he was not there, and there is no testimony that he was.

Mr. PLATT.—I understood that he testified he spent two days going about the land.

Mr. DENMAN.—Yes, but what land?

The COURT.—(Q.) Were you ever on this land in question? A. Yes, sir. [226]

Mr. DENMAN.—(Q.) The interior of it?

A. No, sir.

(Testimony of J. W. Melrose.)

Mr. DENMAN.—That is what I thought.

Mr. PLATT.—(Q.) How close to the interior land were you?

A. Well, I could not say that I was back over a mile from the deeded land represented on that map, or patented lands.

Q. Were you able from where you were to observe the general character of those lands?

A. I think so.

Q. What was the general character?

A. Why, it is very open land that you can see a large portion of it from many different views or positions that I was on, and following the fence line and hill tops.

Q. From your experience in farming, cattle-raising and stock-raising, what would you estimate the yearly rental of the land represented in the white within the inclosure to be reasonably worth?

Mr. LEWERS.—To which we object, first, on the same general grounds that we interposed to a similar question propounded to the witness Flocker, which question was withdrawn; and secondly, upon the ground that no foundation has been laid, showing the familiarity of this witness with rental values in this country.

Mr. DENMAN.—And on the further ground, if this be for the purpose of giving evidence on an accounting, that the Court has entered no interlocutory order for an accounting; we have not reached that portion of the litigation.

The COURT.—I am inclined to think it would be

(Testimony of J. W. Melrose.)

better to defer this examination until I decide whether this is an unlawful inclosure or not, and then to refer the matter to an expert. My engagements are such, I feel I must leave here, or at least close the hearing of this case by next Friday evening, and I am inclined to think it would be better to defer this, and refer the matter to a Master to take the testimony and make the findings. [227]

Mr. PLATT.—We will defer to your Honor's wishes in that regard, if the Court please.

The COURT.—If the matter were one of less importance, and between individuals, and it could be done, I would feel as though I ought to take the matter up now in order to save expense, but from the way witnesses have been subpoenaed, I don't think the question of expense counts very much with either party.

Mr. PLATT.—I will state, if the Court please, the reason the Government is attempting at this time to show values in the nature of joining issue by testimony for an accounting, is that by and through a stipulation entered into between counsel, and upon which stipulation, as I understand it, an order of the Court was made, this case was ordered to be tried orally before the Court, and the purpose of securing that stipulation and order, as I understand it, in fact it was the Government's purpose, to obviate the necessity of referring anything to a Master, and permitting the entire issues involved in the case to be presented orally in open court before the Court. I make that explanation in order that your Honor will

(Testimony of J. W. Melrose.)

be advised as to why the Government is attempting at this time to show the value of these lands before the Court orally on the trial.

Mr. DENMAN.—There has been no stipulation that there could be an accounting before there is an interlocutory order for an accounting.

Mr. LEWERS.—We do not understand it that way.

Mr. PLATT.—I am explaining my position, if the Court please.

The COURT.—I think it would be unfortunate if I have to continue the hearing of this case, the main issue, very unfortunate, so I think we had better postpone that testimony. If we have time, and you both wish me to hear that testimony, if you conclude [228] this case in two or three days so I can hear that before I go to San Francisco, I will hear it; but I want to get through with this main issue before I go away.

Mr. PLATT.—You may cross-examine.

Cross-examination.

Mr. DENMAN.—(Q.) As a matter of fact, Mr. Melrose, what you did in that country was to follow the fence? A. Yes, sir.

Q. And that was all, wasn't it? A. Yes.

Q. You went around there with Harry Petrie, didn't you? A. Yes, sir.

Q. And also with Mr. Flocker? A. Yes, sir.

Q. That is the only time you have been in there?

A. That is the only time.

Q. And that was when? A. July, 1911.

(Testimony of J. W. Melrose.)

Q. And all that you saw of that interior land was what you could see of it from the fences as you rode?

A. Yes, sir; and I made some trips ácross high points a-foot, that would give me different views of the land.

Q. You went up and looked at that natural barrier, up in the northeast corner, didn't you?

A. Well, at a distance, yes, sir.

Q. I mean the thing that is called a barrier on this map, right here, or Toejam Mountain, you went up and looked at that, didn't you?

A. I didn't go up there, it was in plain view from the country I was in; I wasn't up, plumb up to the country it was in or placed on the map at all.

Q. And as you came across, you came across from what is called North's fence here, and came down to Nelson's fence on the other side, and then came down here? A. Yes, sir. [229]

Q. And you saw all that country in there?

A. Yes, sir.

Q. And as you came through there you had some discussion as to whether or not this was a barrier, didn't you?

Mr. PLATT.—Object on the ground it is improper cross-examination.

Mr. DENMAN.—Withdraw the question.

The COURT.—Objection sustained.

Mr. DENMAN.—(Q.) And then you came on down, followed the fence around, right around the line of fence, clear back along Willow Creek?

A. Yes, sir.

(Testimony of J. W. Melrose.)

Q. Through the open lane here? A. Yes, sir.

Q. Across through this road? A. Yes, sir.

Q. Back to what is called Opening No. 1?

A. Yes.

Q. That is all you know about this land in here, is what you saw from riding around the ranch?

A. Yes, sir.

Q. How long did it take you to make this round?

A. We covered the ground in a half a day, we doubled up onto this Willow Creek, I think they term it, 6 or 7 miles from the Home Ranch or Dutton's Ranch, covered that portion of the ranch very carefully the first half day we was out; and the next day we completed the circle, coming in over some of the same ground we had covered the day before.

Q. And you say you saw the land from this end here; how much time did you spend up between North's fence and Nelson's fence?

Mr. PLATT.—I object on the ground it is improper cross-examination.

Mr. DENMAN.—He has testified as to the character of this country.

Mr. PLATT.—All of these questions asked were preliminary questions, looking to his knowledge as a stockman to qualify him to [230] testify as to the value of the lands upon the interior; and also as to whether he saw the lands and became acquainted with them, with that purpose and end in view; and the questions themselves manifestly show they were merely preliminary questions looking toward testimony upon valuations of those lands. If they de-

(Testimony of J. W. Melrose.)

sire, if the Court please, they have the privilege of making this witness their own witness, and bringing out any additional information he might have, and which the Court considers proper.

Mr. DENMAN.—The point is, you asked me to cross-examine upon your own examination; it was your own suggestion.

Mr. PLATT.—When I turn a witness over for cross-examination it means cross-examination, and does not mean cross-examination on anything not material.

Mr. DENMAN.—Your direct examination brought forth the statement that he had passed through this country; I am trying on cross-examination to show how long he was between North's fence and Nelson's fence, in passing through.

The COURT.—I will sustain the objection that it is not proper cross-examination.

Mr. LEWERS.—Might I make a suggestion, before your Honor makes a final ruling; from another angle of this proposition which tends to show it is cross-examination?

The COURT.—Well, you may argue, but the rule is fixed now, and it will remain so. You can make him your witness, if you wish to.

Mr. LEWERS.—The suggestion I desired to make was merely this: I don't think we are called upon to make him our witness, when we are entitled to ascertain why he went there, and what he went there for, and if the Government fails to bring out from the witness whom they have called, who is here pres-

(Testimony of J. W. Melrose.)

ent, and was on the [231] ground, certain things which are essential to their case, testified to by another man who was present at the same time, we are not bound by that, but we are entitled to any inference that may be drawn from their failure to do so, and on cross-examination, for the purpose of laying a foundation for that inference, which inference is based on a recent holding of our own Supreme Court, we are entitled to show just where he went and what he did.

The COURT.—I shall sustain the ruling on the ground it is taking up time. This witness has simply gone on the stand and testified with a view of qualifying him to state what the value of the interior of that land was. He said he was there where he could see it, and he went around so that he could see it. Now to go through and question him as to everything he saw, and what he said to people to whom he talked, does not seem to me to be within the limits of cross-examination. You may put this witness on as your witness in chief, but the objection will be sustained, and you will be allowed an exception.

Mr. LEWERS.—We ask an exception to the ruling of the Court.

The COURT.—It will be granted. I want to get through with this case as soon as possible. It is not with a view of shutting out any testimony; but you have a right to put that in on your direct examination, and it don't seem to me to be within the limits of strict cross-examination.

Mr. LEWERS.—I desire to add to the exception,

(Testimony of J. W. Melrose.)

so our position may be clear, that if the witness is called as our witness, we will be unable to lay any foundation to show prior statements made by the witness.

Mr. DENMAN.—(Q.) Now, Mr. Melrose, you have testified that this was rolling land? A. Yes.

Q. And by that you refer to this Government land lying in the [232] middle of the map here?

A. Yes, sir.

Q. Did you see this level rolling land in here as you looked back from the space between North's fence and Nelson's fence?

Mr. PLATT.—I object, if the Court please, on the same ground.

Mr. DENMAN.—I think that is proper cross-examination, the testimony is in.

The COURT.—I will allow that question to be answered yes or no.

A. Portions of it.

Mr. DENMAN.—(Q.) Now did you look at that land in there from this space between North's fence and Nelson's fence?

A. Well, I walked across that distance there, probably 3 miles, it *taken* me an hour or an hour and a half.

Q. Who was with you when you walked across there?

A. No one; well, a portion of the time there was, a portion of it I walked alone, and then was joined by Mr. Flocker.

Mr. DENMAN.—That is all.

Mr. PLATT.—That is all. [233]

[Testimony of Ray Haws, for the Plaintiff.]

RAY HAWS, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. State your full name, please. A. Ray Haws.

Q. Where do you live? A. Elko.

Q. How long have you lived there?

A. I have lived there nearly six years.

Q. What is your business or occupation?

A. Well, at the present time it is general work; we did have a livery stable there.

Q. How long were you in the livery business, just approximately? A. About 3 years and a half.

Q. Are you acquainted with what is known as the Squaw Valley property of the Golconda Cattle Company? A. Yes, sir.

Q. I wish you would step to the plat here at the blackboard, marked Government's Exhibit No. 1, and examine it, and state whether you can testify or not that you are familiar with the land represented upon that plat. I call your attention, in order to assist you, that you will notice some natural landmarks, Willow Creek, Rock Creek, Toejam Mountain, Nelson's fence and North's fence. Do I understand you to testify that you are familiar with that section of country as represented upon the map?

A. Yes, sir.

Q. State how you familiarized yourself with that country, how many visits you made upon that land?

A. Riding there.

(Testimony of Ray Haws.)

Q. Riding there? A. Yes, sir.

Q. How frequently have you ridden there?

A. Well, several different times.

Q. And what was your position while you were riding there, what were you doing?

A. Owned horses. [234]

Q. Do you remember when you last visited the land? A. Yes, sir.

Q. When was that?

A. That was 2 years ago, 2 years ago in the fall.

Q. You don't remember about what month, do you? A. It was in September.

Q. 1910? A. Yes, sir.

Q. And who, if anyone, was with you?

A. Mr. Flocker and Mr. Gray.

Q. State whether or not—if I may be permitted to ask a leading question, it may be objected to, don't answer the question until counsel have an opportunity to object—but state whether or not upon this last visit, or at any other visit, you observed any cattle, horses, or sheep grazing within the land represented in white to which I am pointing, and assumedly being Government land?

A. I don't just understand your question.

Q. It has been admitted in testimony that the land here in the white upon the plat is Government land, I will ask you whether upon any of your visits you ever noticed any cattle or sheep or stock of any kind grazing or being herded upon those lands?

A. At all times.

Q. At all times? A. Yes, sir.

(Testimony of Ray Haws.)

Mr. DENMAN.—One moment. The admission regarding white lands, it is only those lands between the creeks, not outside of the creeks.

Mr. PLATT.—I am only talking about the inclosure, that must be manifest, and I pointed to it, and ran my hand over it.

Q. Then as I understand it, you noticed this stock grazing upon these lands in 1910, more particularly in September, when you made your last visit accompanying Mr. Flocker and Mr. Gray? [235]

A. No more particularly than I had before; I always noticed them there, they always had been there.

Q. Do you know whose cattle, stock or sheep they were? A. No, sir, I don't.

Q. You don't know that?

A. No, sir; they were everyone's, belonged to everybody.

Q. Do you know whether they did or not?

A. Yes, sir.

Q. How close were you to them?

A. Well, we used to have them in the corral.

Q. Oh, in the corrals?

A. We used to catch the horses there and corral them.

Q. When did you use to do that?

A. It was two years before that, that was the last time when I was there.

Q. Two years before that? A. Yes, sir.

Q. Then, as I understand it, two years before September, 1910, you used to see everybody's cattle,

(Testimony of Ray Haws.)

sheep and horses, as you say upon this land indicated in the white?

Mr. DENMAN.—Object to that as not what the witness said. What the witness said was two years ago he saw everybody's cattle in there, and two years before that, he saw his own horses in there.

Mr. PLATT.—I don't think that is his testimony.

The COURT.—Well, let the witness tell again.

WITNESS.—Well, I understood that he meant it that way, if I had seen them there all the time.

Mr. PLATT.—(Q.) State whether or not you saw everybody's horses, cattle and sheep within that inclosure at the time you made the visit with Mr. Flocker and Mr. Gray.

A. No, sir, I did not; I didn't see everybody's.

Q. Whose cattle, horses and sheep did you see in there when you [236] made the visit with Mr. Flocker and Mr. Gray?

A. I don't know whose they were.

Q. You don't know whose they were?

A. No, sir, not at that visit there, not at that time.

Q. Did you ever make an additional visit after that time? A. No, sir.

Q. State, if you remember, about how many horses, cattle and sheep you noticed when you were there with Mr. Flocker and Mr. Gray.

A. I don't remember.

Q. Can you give any approximate idea?

A. If I remember right, there wasn't very many.

Q. Were not very many? A. No, sir.

Q. How many visits did you make to this property

(Testimony of Ray Haws.)

prior to the last visit that you made with Mr. Flocker and Mr. Gray? A. To that place, you mean?

Q. Yes.

A. I was there, I guess, six or seven times.

Q. Six or seven times?

A. That is to stop right close there and walk out there.

Q. Do you know when the fence represented on the plat in the black line to which I am pointing, namely, upon the western section of the plat, when that fence was built?

Mr. DENMAN.—Of your own knowledge.

A. On the west side?

Mr. PLATT.—Yes.

A. No, I don't.

Q. You do not? A. No.

Q. State whether or not, if you have the knowledge, if before the fences were built you noticed more cattle and sheep and horses upon the land indicated within the inclosure in the white than you did after the fences were built.

Mr. DENMAN.—Object to the question as leading.

Mr. PLATT.—Well, it is leading, if the Court please, but I am [237] desirous of expediting the examination.

The COURT.—I will sustain the objection.

Q. How many horses, cattle and sheep, if you remember, and belonging to what people, did you observe upon the lands represented on the plat within the inclosure, before the fences were up, and the fences built as they are shown upon the plat?

Mr. DENMAN.—Object to the question as being

(Testimony of Ray Haws.)

indefinite; it may be over a period of ten years, and can have no relevancy as to the total number he saw at any time.

Mr. PLATT.—Well, at any one year, I will amend the question to that extent.

A. In the spring of the year, be from ten to fifteen thousand head of sheep in there.

The COURT.—(Q.) When was that?

A. That was from 8 or 10 years ago; we were down there regularly for 4 or 5 years, go down every spring; every spring they were in there, lambing in there.

Mr. PLATT.—(Q.) Now do you know from which direction those sheep came, and were grazed and herded? A. No, I don't know.

Q. You don't know that? A. No.

Q. Now, how many head of stock, cattle, or sheep did you observe after the fences were up?

Mr. DENMAN.—What fences do you refer to?

Mr. PLATT.—Well, the fences around this plat. If the Court please, it seems to me those are trifling objections; I have been drawing his attention to the fences on the plat.

Mr. DENMAN.—It has not been shown that he knew when the fences were up, or what fences counsel is referring to. There are several fences here. It is a vague, indefinite and general question. We are entitled to know for the purpose of cross-examination on direct examination, what fences are referred to in the question. [238]

Mr. PLATT.—The previous question, which the

(Testimony of Ray Haws.)

witness just answered, was directed in the same manner to this inclosure and these fences, and there was no objection by counsel. The question was how many head of stock, cattle and sheep did you ever notice within that inclosure before these fences were up; there was no objection, and the witness said 15 or 20 thousand sheep; now I ask how many head of stock, cattle, or sheep did you observe within this inclosure after the fences were up?

The COURT.—Could you confine that to a particular year? That would be more definite.

Mr. PLATT.—(Q.) As I understand it, you testified you saw 15 or 20 thousand sheep in there 8 or 10 years ago?

A. That was the first time I was there, and from then on.

Q. And from then on up to what time?

A. Up to 1908, I believe was the last time I was there.

Mr. DENMAN.—(Q.) That was the last time you were there, was it? A. Yes, sir.

Mr. PLATT.—(Q.) Then you never made any other visit there from 1908, until you made the visit with Mr. Flocker in 1910?

A. Only to go through there.

Q. Only to go through there; but up to the year 1908, you saw each year, as I understand it, about 15 or 20 thousand sheep lambing within that inclosure, so-called? A. Yes, sir.

Q. And after 1908 how many times did you go through that inclosure; and I use the term advisedly

(Testimony of Ray Haws.)

in order that I may expedite my questioning?

A. Well, 4 or 5 different times.

Q. What seasons of the year did you go through subsequent to that time?

A. I could not say, I don't remember when it was.

Q. Well, did you go through several times during each year?

A. Well, I believe I made a couple of trips one year, a couple the next, and so on that way; I could not say when it was. [239]

Mr. DENMAN.—(Q.) On the county road?

A. Yes, sir.

Mr. PLATT.—(Q.) As I understand it, after 1908, you did not observe these large number of sheep, 15 or 20 thousand sheep, lambing or crossing within that inclosure?

A. No, sir, not from the county road I didn't.

Q. Not from the county road? A. No, sir.

Q. You went right along the county road, did you?

A. Yes, sir, I never left it.

Q. And you did not observe any of those sheep lambing or grazing there after 1908? A. No, sir.

Q. Do you know whose sheep grazed and lambled within that inclosure during the year 1908, and prior thereto?

A. I was satisfied that they belonged to—

Mr. DENMAN.—One moment. You were told?

Mr. PLATT.—(Q.) Well, I asked you if you know?

A. By the herders.

(Testimony of Ray Haws.)

The COURT.—(Q.) You don't know of your own knowledge? A. No, sir.

Mr. PLATT.—(Q.) Did you know the herders?

A. Yes, sir.

Q. The information that you have upon that is what the herders told you, is that right?

A. Yes, sir.

Q. Did you see any of the iron marks or brands upon the sheep? A. Yes, sir.

Q. Did you know whose iron marks or brands they were? A. Yes, sir.

Q. Whose were they?

A. They were Pitchfork sheep, a lot of them.

Q. What were Pitchfork sheep?

A. They belong to the Golconda Land and Cattle Company.

Q. And those sheep belonging to the Golconda Cattle Company were grazing each year, for a number of years, up to 1908, upon the [240] lands represented in the white? A. Yes, sir.

Mr. DENMAN.—Please don't lead him, Mr. Platt.

Mr. PLATT.—I am simply repeating. (Q.) How many times, Mr. Haws, did you observe sheep grazing within this inclosure, bearing the branding mark or iron "Pitchfork" or symbolic of that?

A. Every time I was there in those years that I used to ride in there.

Q. Now, did you ever notice any sheep, cattle, stock or horses belonging to other people grazing or within that inclosure, prior to the year 1908, and up to that year? A. Yes, sir.

(Testimony of Ray Haws.)

Q. Did you see the brands or iron mark upon the cattle, sheep, or horses, that you noticed?

A. Yes, sir.

Q. And do you know what they were?

A. Yes, sir.

Q. Did you know the branding marks?

A. Yes, sir.

Q. And what they represented? A. Yes, sir.

Q. Well, to whom did the stock, cattle, or sheep belong? A. There was lots of "25" cattle in there.

Q. Who owns the "25" cattle? A. Russell.

Q. What other cattle were there?

A. Two bar circle.

Q. Who owns the two bar circle?

A. Noble owns them, or did own them at that time.

Q. Did you notice any other cattle in there?

A. Yes, sir.

Q. Whose were they? A. Pitchfork cattle.

Q. Is that all? A. "T. S." cattle.

Q. To whom did they belong?

A. Belonged to the Dunphy Estate.

Q. What other cattle?

A. "Rolling-pin" cattle.

Q. To whom did they belong? A. Fairchild.

Q. Anybody else's?

A. A few of mine strayed down in there.

Q. Now, state, if you can, over what part or portions of this land represented in the white they grazed?

A. They grazed over the whole thing. [241]

Q. Over the whole thing? A. Yes, sir.

(Testimony of Ray Haws.)

The COURT.—(Q.) Does this refer to the time before 1908, that you saw these cattle?

A. Yes, sir.

Mr. PLATT.—(Q.) Do you recall, Mr. Haws, from what direction the cattle, sheep, or horses which you just testified you saw grazing upon these lands came?

Mr. DENMAN.—He testified that he did not know.

A. I know which way a lot of the cattle came from.

Mr. PLATT.—(Q.) Which way did they come from?

A. Well, the cattle came from the Humboldt side, the south side, a lot of the cattle.

Q. Could you indicate upon the plat just about where they came from?

A. They came up from along here, Willow Creek (indicates on plat).

Q. If you will, indicate upon the plat about where you know they started from. You say up in this direction, that is a little bit vague.

A. From the Humboldt River.

Q. Where is the Humboldt River relatively to the plat? A. It is south of it.

Q. Can you indicate upon the blackboard about where it is?

Mr. LEWERS.—It is over 50 miles.

A. Yes, it is a long way.

Mr. PLATT.—(Q.) I just want the relative direction, that is all. Well, did you ever see the cattle going up from the south?

(Testimony of Ray Haws.)

A. I saw them working them up in the spring of the year.

Q. How close to this fence did you see them working them up?

A. I saw them working right up Willow Creek.

Q. And where did they begin to start working up Willow Creek, as you noticed?

A. They came in about here (indicates), from below here a ways, and then from there run clear on up. [242]

The COURT.—That is very indefinite, Mr. Platt.

Mr. PLATT.—Yes, I am trying, if the Court please, to direct his attention. They came through from a point—

Mr. DENMAN.—Please don't lead him; you have your finger—

Mr. PLATT.—I am pointing just where he did in order that I may direct his attention to the markings upon the map. Is that where you put your finger (indicates)?

A. Yes.

Q. Am I correct where I put my finger?

A. Yes.

Q. That is where you put yours, was it not?

A. Yes.

Q. There is no question about that, is there?

A. No.

Q. Then you saw the cattle starting from a point upon the plat marked as section 11, township 38 north, range 47 east, and going in a northerly direction towards this inclosure; is that true?

Mr. DENMAN.—I object to the question as lead-

(Testimony of Ray Haws.)

ing. Then you saw the cattle do so and so. Ask him what he saw.

The COURT.—The objection is sustained. It is a leading question, and you had better reform it.

Q. I wish you would point to the plat and tell the Court where you saw the cattle start from, or where you saw them.

A. They were working them right up Willow Creek; this is Willow Creek, is it not?

Q. Yes.

A. They were working them right along up Willow Creek from below here.

Q. Below where?

A. Below this Creek, Ivanhoe, about 4 or 5 miles, or such a matter.

Q. Four or five miles below Ivanhoe Creek?

A. Yes; and from there they worked them right on up the creek, and let them go as they worked them up.

Q. And while they were working them up the creek did you see them graze upon the lands indicated in white? [243]

Mr. DENMAN.—Object to the question as leading. Ask what he saw.

Mr. PLATT.—He so testified. (Q.) State where you saw them grazing.

A. Saw them grazing there.

Q. What do you mean by “there”?

A. On this land here, this plateau between Rock Creek and Willow Creek.

Q. On the plateau between Rock Creek and Willow

(Testimony of Ray Haws.)

Creek, is that true? A. Yes, sir.

Q. How many times have you seen cattle being worked in that direction, in addition to the time that you have mentioned, if at all?

A. Once or twice before that.

Q. Once or twice before that? A. Yes, sir.

Q. Do you know whose cattle they were?

A. They were mostly "25" cattle.

Q. And to whom do they belong? A. Russell.

The COURT.—(Q.) When was that you saw this?

A. That was when I was riding over there.

Q. What year was it?

A. I don't know what year.

Q. About what time?

A. It was about 1906 or 1907.

Mr. PLATT.—(Q.) Now, state whether or not you have seen any cattle, horses, or sheep grazing in that direction since the year 1908.

A. Why, yes, I have seen them grazing in that direction since then; from the road I saw them.

Q. Grazing from the road?

A. Just saw them passing along the road, saw them, that is all.

Q. Passing along the road designated upon the plat as the road beginning at Opening No. 1 and ending at Opening No. 6?

Mr. LEWERS.—No, the road comes out before that.

Mr. PLATT.—Well, Opening No. 7, both on the road.

A. What was the question? [244]

(Testimony of Ray Haws.)

Q. You say you saw them grazing along the road represented upon the plat from Opening No. 1 to Opening No. 7; this dotted line representing the road.

A. Yes, sir, I have; when I have been riding along the road I saw stock along here.

Q. Stock along the road? A. Yes, sir.

Q. Now, whose stock were they, if you know?

A. I don't know.

Q. Were you close enough to see the horses or brands?

A. I was if I had paid any attention, I suppose.

Q. But you didn't pay attention? A. No, sir.

Q. And when did you see them grazing along the road there?

A. When I was travelling back and forth from Gold Circle to Tuscarora.

Q. And you don't know whose cattle they were?

A. No, sir.

Q. State upon what portion of the lands represented upon the plat they were grazing.

A. They were grazing out from the road up along the foothills there along the creek; you could see them scattered all along any time you would go along there.

Q. Scattered along where?

A. Along the foothills from the creek.

Q. Where are the foothills relatively upon the plat, if you can point them out?

A. The creek run in along here, and the foothills would be out here a little ways (indicating).

Mr. DENMAN.—That would be the upper edge of blue line?

(Testimony of Ray Haws.)

A. Yes, sir, about that.

Mr. PLATT.—(Q.) And that is where you saw them after 1908?

A. Yes.

Q. That is, at the foothills near the creek?

A. That is as far as you can see to the top of the hill.

Q. That is as far as you can see from the road?

A. Yes, sir. [245]

The COURT.—(Q.) Is that the edge of the creek or the edge of the blue ground?

Mr. PLATT.—As I understand it, the foothills begin at the edge of the blue, don't they?

A. About along there, I would judge; it is not very far from the creek.

Q. That is where you say they fed in 1908, is that true? A. Yes, sir.

Mr. DENMAN.—By that you refer to the foothills along Willow Creek? A. Yes, sir.

Mr. PLATT.—(Q.) State whether or not you ever saw any cattle grazing from the north or northwest along the lands represented by the white.

Mr. DENMAN.—Now, Mr. Platt, I object to that question as leading; first, to the form of the question, and second to the fact that you indicate on the map with your finger the direction you want to show the cattle to have come, and where they go. If you ask what he saw with reference to the cattle moving in that direction, but to point out the whole thing on the map, and have the witness follow your fingers, is hardly a fair thing on direct examination.

(Testimony of Ray Haws.)

Mr. PLATT.—I want to shorten the hearing as much as I can.

The COURT.—Avoid leading questions as much as possible.

Mr. PLATT.—(Q.) State whether or not you ever saw any cattle grazing from the north or northwest, going in a southeasterly direction.

A. I saw them going in all directions there; I never saw no more than just 4 or 5 head in a bunch, grazing along there; I saw lots of them.

Q. When did you see that?

A. Several bunches.

Q. When did you see that?

A. At some time before 1908 when I was in there.

[246]

Q. Before 1908? A. Yes, sir.

Q. Did you see them after 1908?

A. No, sir, I wasn't there after 1908.

Q. Along the road?

A. I wasn't down on that side.

Q. Not on that side? A. No, sir.

Q. But you are positive that before 1908 you saw them graze from the north down in a southeasterly direction? A. Yes, sir.

Mr. DENMAN.—Object to the question as leading. Objection sustained.

Mr. PLATT.—It was simply repeating what he testified to, if the Court please.

Mr. DENMAN.—I understand the answer is stricken out to the last question.

Mr. PLATT.—I do not object.

(Testimony of Ray Haws.)

The COURT.—It may be stricken out.

Mr. PLATT.—(Q.) Upon what lands did you see them graze while they were coming from a north-westerly direction, and going in a southeasterly direction?

A. On those same lands.

Q. What do you mean by the “same lands”?

A. Between Willow Creek and Rock Creek.

Q. Between Willow Creek and Rock Creek?

A. Yes, sir.

Mr. PLATT.—That is all. You may cross-examine.

Cross-examination.

Mr. DENMAN.—(Q.) Now, Mr. Haws, we have had a lot of vague examination about what you saw. When you came into this country you would see a bunch of cattle, say 4 or 5 cattle, where my finger is at No. 7, township 39 north, range 48 east, you would see a bunch of cattle there, would you? A. Yes.

Q. You could not tell when you saw those cattle where they came from; you just saw the cattle there?

[247] A. I saw them there.

Q. Then you saw other cattle along in another place, a little bunch? A. Yes.

Q. You could not tell where they came from?

A. No.

Q. Not unless you drove them in there? A. No.

Q. And all you can say is when you went through you saw little bunches of cattle in different places?

A. They were ranging.

Q. You could not tell as you looked at those

(Testimony of Ray Haws.)

bunches whether the cattle ranged from one direction or another; you simply knew there was a general drift at that time of the year, that was all?

A. Yes.

Q. And how far they came from, or where they drifted from, you could not tell, except as you knew the brands, and knew where they might have come from? A. Yes.

Q. Is it not true cattle drifting through this country, drifting north from the Humboldt country, prefer to follow the creeks?

Mr. PLATT.—Object to the question on the ground it imputes a knowledge of preference to the cow, or sheep, or lamb, to the animal itself, and that certainly cannot be within the knowledge of this witness.

The COURT.—I will allow the question.

Mr. DENMAN.—(Q.) That is a fact, is it not, that the animals in drifting north follow the creek bottoms up?

Mr. PLATT.—I interpose the additional objection; it is calling for the opinion of the witness.

The COURT.—I will allow the question.

Plaintiff excepts.

Mr. DENMAN.—(Q.) That is a fact, is it not?

A. Answer the question?

Q. Yes. A. Yes, sir. [248]

Q. Now, as you come along this road here can you see the Government land over here? I am now speaking of the road from Opening No. 1, running easterly to Tuscarora, can you see the so-called Gov-

(Testimony of Ray Haws.)

ernment land in white to the north of you, from that road, to any extent; is it not true that the hills rise on the north side and cut off your view? A. Yes.

Q. And you cannot see what is going on there?

A. Not on top.

Q. The great bulk of that territory is shut out from your view, as you come along this road, is it not? A. Yes.

Q. So you would not be able to give any opinion at all as to what cattle, sheep, or horses were in this territory since 1908? A. No.

Q. You haven't been in a position where you could see? A. No, sir, I could only see from the road.

Q. And that would only take you a short ways up to these hills that rise out from Willow Creek, possibly half or quarter of a mile from the road towards the north? A. Yes.

Q. That is about all, is it not? A. Yes.

Q. And that is true from Opening No. 1 until you come out away beyond anything on this map?

A. Yes, sir.

Q. Now, you said that the *irons* that you saw grazing in through this country before 1908 were "25"?

A. Yes.

Q. That is Russell, is it not? A. Yes.

Q. As a matter of fact, Russell's general range is over here, is it not?

A. I don't know where it is.

Q. Is it not true that the bulk of Russell's cattle range over to the east of Siawappe?

Mr. PLATT.—I object on the ground the witness

(Testimony of Ray Haws.)

is not qualified to testify as to whether he knows where any particular man's cattle range is. [249]

The COURT.—Ask if he knows, if he knows, he can say.

Mr. DENMAN.—(Q.) Do you know whether or not Russell's cattle have a general range just to the easterly of Siawappe, that that is known as Russell's range in there; do you know? A. Yes.

Q. Russell's range lies to the east of Siawappe Creek, does it not, his general range?

A. No more than it does—to the east of Siawappe Creek?

Q. Yes, east of Siawappe and Willow Creek, Russell's general range is in through here, is it not, the "25" cattle range in there?

A. They range in there, yes.

Q. That is where the bulk of them range, is it not? How long were you in there? How long did you punch in there? A. I was there quite a while.

Q. Don't you know, as a matter of fact, that the Russell ranch and Russell cattle range generally in this direction? A. Yes, they do.

Q. That was the case in 1908, and prior to that time? A. Yes, sir.

Q. And they also range up in through here, through this line of blue, through Opening No. 6, up into the high country back in here (indicating), where they get the summer feed, don't they?

A. Yes, and back the other way over those low hills there.

Q. They range in from this opening here; back into

(Testimony of Ray Haws.)

the low hills? A. Yes.

Q. That is the natural way for them to come, is it not? A. I don't know whether it is or not.

Q. How do you know they range over those low hills? A. I have seen them in there.

Q. And you presume they came from this general direction?

A. I guess they did, that is the way they bring them in there.

Q. In through that opening here? [250]

A. No, not through that opening there.

Q. Oh, there was no opening there at all, no fence there at that time, was there? A. No.

Q. So they brought them in from their range over here, and they ranged across in on this so-called Government land, into the left, is that correct?

A. I don't understand you.

Q. Well, we will have to take that up another way. Now, you say you punched cattle all through that country?

A. Not cattle altogether; horses, mostly.

Q. Tell me if it is not a fact that the range in on the Government land here is a spring range of about two months' time, during which, in the practice of the country for years, that range has fed sheep, and the Government land in there is practically cleaned off by the sheep ranging and lambing in here during the first two or three months in the spring, and after that time there is practically no feed at all in this territory. Is not that known to you and to every cowboy in that country, practically?

(Testimony of Ray Haws.)

Mr. PLATT.—I object to the question on the ground it is improper cross-examination; the witness was not asked a single question in direct examination as to the character of any of this land, not a single question.

Mr. DENMAN.—You asked him when sheep ranged in there.

Mr. PLATT.—I did; when he saw sheep ranging in there, but I never asked him a single question as to the character of the land.

The COURT.—I will allow that question. The condition of the feed there shows something about when the cattle would be there, and why they would be there, and when they would leave.

Mr. PLATT.—I note an exception.

The COURT.—The exception may be noted.

Mr. DENMAN.—Is not that so?

Mr. PLATT.—Do you understand that question?

[251] A. No.

(The reporter reads the question.)

Mr. DENMAN.—I withdraw the question.

The COURT.—And I suppose you withdraw your objection?

Mr. PLATT.—Yes, your Honor, the objection and exception.

Mr. DENMAN.—(Q.) Mr. Haws, you say that there were some 15,000 sheep ranged in that country in lambing time?

A. I judged there is that many, I don't know.

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Circuit Court of Appeals
For the Ninth Circuit.

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(For Transcript of Record, see Other Volume.)
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VOLUME II.
(Pages 305 to 677, Inclusive.)

Upon Appeal from the United States District Court for the
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(Testimony of Ray Haws.)

Q. How long would that country support those sheep in the spring time; how long would the feed last for those 15,000 head of sheep that ranged in through here?

A. I don't know, I am not a very good judge of anything like that.

Q. Is it not true after the sheep had gotten through lambing in through there—by the way, this is early spring feed through here, is it not? A. Yes.

Q. After the sheep had gotten through lambing and feeding on the early spring feed in there, there was very little feed left in that country, wasn't there?

A. There wasn't a great deal left.

Q. And the practice has been to feed off that country in the spring feeding of sheep, has it not; I am speaking now of this Government territory in here between Willow Creek and Rock Creek; that is correct, is it not?

Mr. PLATT.—I desire to state this question of testifying as to customs and practices, if that is material testimony, the Government might subpoena many witnesses who could testify as to the custom and policy of the Golconda Cattle Company, and its policy as to outside holders of cattle and sheep. If your Honor rules the policy of stock owners, and the policy of the defendant company is testimony, I shall want an opportunity to subpoena many more witnesses. [252]

The COURT.—My view of this case inclines me to think it is testimony of very little weight. I don't really think the intention in a civil suit is a very im-

(Testimony of Ray Haws.)

portant consideration anyway. I don't think it is worth while to consume a great deal of time questioning witnesses on that point. The policy up there can be very easily and quickly shown, and I don't suppose it can be disputed. From my knowledge of cattlemen's practices, and what they have been doing up in that country for the last 15 or 20 years, it is very clear to me what they want to do, and very little testimony is all that is necessary.

Mr. DENMAN.—Of course what I am trying to show is the movement of cattle, as indicating the openings in the fence, and the fact that there were not any cattle or horses in here in the summertime was due to the fact the whole country was fed off by sheep in the spring.

The COURT.—It naturally follows when sheep have been on that ground in the spring they will eat it off, and go elsewhere. Sheep stay but a very short time any place. And if feed only lasts there two months, very few cattle or sheep will remain there after the feed is gone.

Mr. DENMAN.—(Q.) When you spoke of sheep ranging in there, you saw Noble's sheep in there, didn't you? A. No, not Noble's sheep.

Q. How many years were you in there?

A. I was four or five years.

Q. In the springtime?

A. Yes, sir; always in the springtime, when I rode in there.

Q. You claim to have ridden in this country through here? A. Yes.

(Testimony of Ray Haws.)

Q. And you never saw any of Noble's sheep in there during that time—I withdraw that question. Did you ever see any of Nelson's [253] sheep in there? A. Yes, sir.

Q. And you always saw them in there in the spring-time when you were in there? A. Yes.

Q. You say you came through here in the year 1910, in September, with Flocker and Gray?

A. Yes.

Q. Did you cross this country from Nelson's fence over here, to a place called Opening No. A, drive over there with your wagon? A. Yes, sir.

Q. And you are familiar with this country back up towards Toejam Creek and Toeham Mountain?

A. Yes, sir.

Q. Have you ever ridden back in through this country in here? A. Yes, sir.

Q. That is to say, the country lying to the north-east of, or lying between North's fence and Opening No. A, back there? Have you ridden in that country?

A. Yes, sir.

Mr. DENMAN.—That is all.

Mr. PLATT.—That is all, if the Court please.
[254]

[**Testimony of Charles D. Dorsey, for the Plaintiff.**]

CHARLES D. DORSEY, called as a witness for the plaintiff, having been sworn, testified as follows:

Direct Examination.

(By Mr. PLATT.)

Q. Will you state your full name?

A. Charles Dennis.

(Testimony of Charles D. Dorsey.)

Q. Where do you live, Mr. Dorsey? A. Midas.

Q. What is your present occupation?

A. Why, I am in the saloon and cafe business at Lovelock, at the present time.

Q. Are you acquainted with what is known as the Squaw Valley property of the Golconda Cattle Company? A. Yes, sir.

Q. State whether or not you were officially connected with the Golconda Cattle Company at any time.

A. At one time I was foreman, in 1907, of the Squaw Valley Ranch.

Q. In what year? A. 1907.

Q. I ask you to step to the plat, Government's Exhibit No. 1, and state whether or not you can identify the plat, as approximately representing the property over which you were foreman?

A. Well, at the time I was in charge of the ranch, the main ranch houses were all about here (indicates); the houses were just west of this Rock Creek.

Q. That is down in section 7? A. Well, yes.

Q. Of township 39 north, range 47 east?

A. Yes, sir; and I had jurisdiction over the whole of Rock and Willow Creek; I was out on those streams pretty near every day, keeping sheepmen from trespassing on the company's land. At the time I took charge of the place, the sheep were going through the Squaw Valley country, and I was on both streams, keeping sheep from trespassing on the com-

(Testimony of Charles D. Dorsey.)

pany's ground at that time, so I was pretty familiar with those two streams.

Q. Can you indicate from the plat approximately the company's [255] land as shown upon the plat?

A. Well, nearly so, yes.

Q. Well, do so, will you? I don't mean in detail, but just generally speaking.

A. Well, as it was described to me by the company—

Mr. DENMAN.—I object; that is hearsay.

Mr. PLATT.—(Q.) Well, was it described to you while you were an official of the company?

A. Yes, sir.

The COURT.—I suppose this is preliminary, is it?

Mr. PLATT.—Yes, your Honor.

The COURT.—Of course you cannot show title in this way; I don't suppose there is any question about the title. Let him give the testimony, and then you can move to strike out.

Mr. PLATT.—I am not trying to establish title, because it has been admitted that practically all of the land in the blue belongs to the Golconda Cattle Company, with a few exceptions.

Mr. DENMAN.—Well, with the exception of the northeast corner. We don't concede that is it practically, at all.

The COURT.—Read the question.

(The reporter reads the question.)

WITNESS.—That was what I was trying to describe.

The COURT.—You may answer it, and counsel

(Testimony of Charles D. Dorsey.)

may object later.

A. I understood at that time that the company had the land along both creeks, so that it would cover all of the water.

Mr. PLATT.—What creeks?

A. Rock and Willow.

Q. Rock and Willow Creeks? A. Yes.

Q. When did you leave the employ of the company? A. October, 1907.

Q. Have you any knowledge at this time as to the fence line of the Golconda Cattle Company during the time that you were foreman, and at the time that you ceased to be foreman and left the employ of the Company?

A. Yes, sir. That is, am I— [256]

Q. You may explain the answer.

A. That is the inclosure at the time I was foreman for the Golconda Cattle Company.

Q. Well, you use the term inclosure, I use the term fence line, now if inclosure makes it plainer to you, I don't care which construction you take for the purposes of the question.

A. Well, the question I am in doubt about is whether the fence lines that were there at the time I was foreman?

Q. Yes. A. Yes.

Q. Assuming, for the sake of this question, that the black line upon the plat, upon the extreme outside of the land indicated in the blue upon the plat, represents generally the fence maintained by the Golconda Cattle Company, can you point out to the Court just

(Testimony of Charles D. Dorsey.)

how much of that fence was built at the time you were foreman, and at the time you left the employment of the company? A. Yes, sir.

Q. I wish you would so state.

A. Well, at the time I left the employment of the company, there was none of this fence.

Q. None of what fence, so we can get it in the record?

A. Well, there was none of this—well, I will say from here.

Q. From a point in section 5 of township 38 north, range 47 east—I hope I won't be accused of leading the witness, if the Court please—up to what other point?

A. Well, in section 17 of the same township.

Q. As I understand it, there was no part of the fence built from section 5 along to section 17?

A. No, at the time I left there there was nothing farther north of section 5, nor east of 9.

The COURT.—There was none north of section 5, and none east of 9? [257]

Mr. PLATT.—Of township 38 north, range 47 east. Is that true?

A. That map is kind of turned around to me.

Q. Well, you will understand that the upper portion of the plat is north. (Explains map to witness.)

WITNESS.—When I was there the fences ran from the ranch houses right along Rock Creek—looking at the map the way I have to, it would have to be turned just around.

The COURT.—(Q.) Let me ask you, Mr. Dorsey,

(Testimony of Charles D. Dorsey.)

how many miles of fence were there on Rock Creek at that time?

Mr. DENMAN.—On the portion shown on the map, your Honor?

The COURT.—North of where Rock Creek and Willow Creek unite.

A. Probably four.

Q. How many miles were there on Willow Creek east of where Willow and Rock Creeks unite?

A. The fence just crossed Willow Creek a little above the junction.

Q. Well, do I understand you that there was no fence on Willow Creek above the junction?

A. Not at that time, no, sir; not when I was there.

Mr. PLATT.—(Q.) Now, how much of a line of fence was there, Mr. Dorsey, further north along Rock Creek, beginning at a point four miles north of the beginning of Rock Creek?

A. Four miles north of the beginning.

Q. Yes.

The COURT.—North of the junction.

Mr. PLATT.—North of the junction between Rock Creek and Willow Creek.

A. In October, 1907?

Q. Yes. A. There was none.

Q. As I understand it, there was no fence at all along Willow Creek? A. No, sir.

Q. In October, 1907?

A. No, sir; there was none. [258]

Q. Now, you testified a moment ago that at times you went along Willow Creek, I think you said, for

(Testimony of Charles D. Dorsey.)

the purpose of keeping sheep trespassers out of the company's land? A. Yes, sir.

Q. Do you remember when you performed that service for the company?

A. Well, at all times when I was in charge.

Q. Well, do you remember what particular sheep trespassers you ordered out?

Mr. LEWERS.—If the Court please, I don't see the relevancy of any inquiries about any sheep trespassers upon the company's land in 1907, so far as it affects an inclosure of May 31st, 1911, is concerned.

Mr. PLATT.—It is a little testimony with reference to the policy of the company, with reference to people who wanted to cross their lands for the purpose of getting upon the Government land.

The COURT.—I don't know that that is relevant. I know what the policy was during those times. There was no question about that. Of course every cattleman tried to keep sheepmen away, and they used every effort and device they could to prevent sheep from coming on their lands, because it impaired the value of their ranges for stock; and it was done everywhere. I don't know that that has any particular bearing on this fencing; but if you think it is a matter of any importance, I presume that will be conceded, because that is unquestionably the fact; there is not a cattleman in that country anywhere who did not use every means he could to prevent sheep from coming anywhere in his neighborhood.

Mr. LEWERS.—In that connection I suggest the proof ought to be followed by what is almost a uni-

(Testimony of Charles D. Dorsey.)

versal fact in this same country, that many cattlemen became also sheepmen, and the custom has become somewhat muddled; and the matter of antagonism has [259] largely disappeared, because of the dual character of the holdings. But I fail to see its relevancy, and object to it on that ground.

Mr. PLATT.—The only object of the testimony is to show that sheep were not permitted to get within that inclosure upon the Government land. Now, I concede, if the Court please, the animosity existing between cattlemen and sheepmen; but so far as this investigation is concerned, we are not concerned with that particular point as to sheep being on private lands of private individuals. The idea is, as I understand it, that the private land owner has no right to exclude sheep from the privilege of grazing upon the public domain, and if he so constructs his fences and so takes up his land that sheep are prohibited from grazing upon the public domain, he is certainly interfering with the right of the public to use the public domain as grazing land.

Mr. DENMAN.—May I ask one question, Mr. Platt? Is it your contention that it is the law that if a man owns a piece of land of the size and character shown here, that he must permit sheep, say a band of 30,000 sheep, to range across that land of his to get on the Government land, and clean out his feed?

Mr. PLATT.—No, I do not contend that; but I do contend that no man, individual, or corporation has the right, as this corporation has done, under the guise of taking up their own land to inclose their own

(Testimony of Charles D. Dorsey.)

land for the purpose of preventing sheep or cattle from grazing upon the Government land.

(Discussion by counsel.)

The COURT.—If this testimony goes to show he was excluding sheep from the inclosure, or land partially inclosed, as you have it there on the map, that is one thing; but the attempt to exclude sheep from land which is practically open, is another matter, [260] and I understand that is the purport of your testimony, that he was attempting to exclude sheep during 1907 from lands on which there were only four miles of fence, whereas your map now shows 44 miles. I do not intend to exclude any testimony which shows efforts on their part to exclude cattle or horses or sheep from that territory surrounded by a fence, even with gaps in it.

Mr. PLATT.—Well, if the Court please, it was leading up to that condition.

The COURT.—You can testify as to that condition, but what happened before that, it does not seem to me throws any light on it. If these were the only people in the country who were keeping everybody off of their territory, and from the very beginning they were the exception, and the only cattlemen, and said this public domain here belongs to us, and everybody keep off of that, perhaps it might show their policy, and show that they intended to defy the law. But I do not think there was any intention to defy the law in that respect, because you cannot say cattlemen are lawless, and every one of them considered that was the proper thing; it was a matter of life and death

(Testimony of Charles D. Dorsey.)

with them; they did everything possible to keep sheep away from their ranges. I will sustain his objection.

Mr. PLATT.—Your Honor will give me the benefit of an exception.

The COURT.—Certainly.

Mr. PLATT.—(Q.) Did you ever have any application, Mr. Dorsey, while you were foreman of the Golconda Cattle Company, for permission to graze sheep, cattle or horses upon any part or portion of the lands represented in the white within the so-called inclosure?

Mr. LEWERS.—To which we make the same objection, that is the [261] same question in another form.

The COURT.—It will be the same ruling and the same exception.

Mr. PLATT.—(Q.) Did you ever have any request made for permission to graze cattle or horses upon the land represented in white as Government land, within that so-called inclosure?

Mr. LEWERS.—To which we make the same objection, as it is the same question; and the further objection it is too remote in time to the issues involved in this case.

The COURT.—It will be the same ruling and the same exception.

Mr. PLATT.—I won't go very far with this; I simply want to preserve the record.

Q. Mr. Dorsey, can you state, as a matter of fact, whether while you were foreman, and notwithstanding your efforts to keep sheepmen off, any cattle,

(Testimony of Charles D. Dorsey.)

horses, or sheep grazed within the inclosure represented upon the plat?

Mr. LEWERS.—To which we object, and hold that the question should be separated, the latter part from the first part, the first part assuming as in evidence certain matters which have been objected to, and which objections have been sustained.

The COURT.—Read the question.

(The reporter reads the question.)

Mr. PLATT.—I don't understand that portion of the testimony was stricken out; if stricken out I will modify the question; but my recollection is that he so testified, and the motion to strike was not made.

Mr. LEWERS.—In order to correct that, I will adopt Mr. Platt's suggestion, and move that the former statement of the witness concerning the exclusion of sheep, be stricken from the record.

Mr. PLATT.—I object on the ground the motion comes too late; that I have interposed another question, and I am interposing [262] that question on an answer made by the witness.

The COURT.—Well, I don't know that it is particularly material. Of course, the testimony tending to show that before the fence was there sheep and cattle ranged over that country freely, and other testimony showing now that they do not, of course is material; and so far as it tends to show that sheep or cattle ranged freely over that territory, then it will be admissible.

Mr. PLATT.—That is the only object.

The COURT.—For that purpose, and that purpose

(Testimony of Charles D. Dorsey.)

alone, it is admitted.

Mr. LEWERS.—My objection went to the first part of the question, and I did not object to the latter portion, which covers what your Honor permits. I objected to the first part because it is indirectly asking the witness to testify whether he excluded sheep.

The COURT.—It can be answered that way then. The question now is whether sheep ranged over that territory in white, while you were there, that territory in white between the two creeks.

A. Yes, there were sheep in there, in the lambing season, and when they were trailing to the north portion of Elko and Humboldt Counties to their summer range.

Mr. PLATT.—(Q.) I wish you would indicate upon the plat, Mr. Dorsey, just where you noticed sheep in there, lambing, grazing, or herding.

A. Well, from section 4 up to section 12, the Golconda Cattle Company used to lamb and graze all over this portion here.

Q. You say over this portion (indicates), if I am following you? A. Yes.

Q. Now will you designate over what sections?

A. Well, there would be 3 and 4 and 33 and 34?
[263]

Q. Wait a minute, 3 and 4 of township 38 north, range 47 east; and what else?

A. 33 and 34; 26, 27, 28, 22, 25, 23 and 24, 12, 13 and 14, township 39 north range 47 east; 7, 8, 9, 16, 17, 18, 19, 20 and 21 of township 39 north, range 48 east. Of course, this is just approximately, I could not say

(Testimony of Charles D. Dorsey.)

just which particular section. That was the Golconda Cattle Company's land.

Q. Now, how many head of sheep, if you know, did the Golconda Cattle Company lamb within that territory that you have just described?

A. Well, at the time I was with them, they had 42,000 head of sheep altogether; I would judge 14,000 to 18,000 head were lambing at that time.

Q. And for how long a period to your knowledge did they so keep sheep upon that land?

A. Well, how long a period each season?

Q. Yes, and for how many seasons, to your knowledge?

A. Well, they started in in March, from that to the latter part of May, and I will say since 1898, that they have been running sheep in there.

Q. Up to and including that date?

A. Well, up to the spring of last year. Now, I won't be positive, Mr. Platt, whether they lambed in there last year or not.

Q. Well, are you positive about their lambing in there in the spring of 1910?

A. Yes, there were sheep lambing there then.

Q. How do you know that?

A. Well, I saw them.

Q. Upon the lands which you have described?

A. Yes, sir.

Q. Now, during the time that you were foreman, state whether or not you ever saw any cattle or horses, or anybody else's sheep grazing upon the lands represented in the white within the so-called inclosure.

(Testimony of Charles D. Dorsey.)

A. Yes, sir. Tom Nelson used to lamb in here some place (indicating), I don't know just exactly the territory, [264] but it was in this northeastern section.

Q. Well, will you indicate upon the plat approximately where that was?

A. Well, I would say from in the North's fence here, northeast of that, and, well, take in this territory here.

Mr. DENMAN.—(Q.) That territory you are describing is territory between what is called Toejam Mountain; the real Toejam Mountain is about 6 miles east of there, is it not?

A. I don't know, I could not say.

Q. But the thing called on here Toejam Mountain, coming down say 4 inches to the south of that, 5 inches to the west, and 4 inches to the north, and then back to the point of beginning, it is in that territory you are describing now, is it not?

A. Yes. Well, now, Nelson started in below the dam; he has a wagon road which starts over the hills here, and he starts to lamb from this territory here, clear through this country.

The COURT.—(Q.) Is that below or above the reservoir?

A. Well, the road starts in below, on Willow Creek.

Mr. PLATT.—(Q.) And where does he proceed?

A. Just as soon as he gets over the divide into a little basin from Willow Creek, he starts lambing one band, always has, that is, up until the time I left there, since then I could not say.

(Testimony of Charles D. Dorsey.)

Q. Since 1907 you have no acquaintance as to that?

A. Not with Nelson's sheep.

Q. Then your testimony, now, is only referable to a period up to the year 1907, when you left?

A. Yes, sir.

Q. And in what direction did he lamb, and over what lands did he go?

A. In a northerly direction from the point just described to Toejam Mountain, or Toejam Creek it was called; I am not familiar with the mountain.

Q. What other cattle, sheep or horses ranged upon those lands, [265] if you know, while you were there; I mean particularly the lands in the white, designated as Government lands, within the inclosure.

A. I don't know of any other sheep grazing there; there were several bunches trailed through that country on the way to their lambing grounds, and the summer ranges.

Q. Now, can you state any particular sheep owners who ranged their sheep during that period?

Mr. DENMAN.—He said they trailed their sheep through, but didn't range there, only the Golconda Cattle Company and Nelson ranged there.

Mr. PLATT.—(Q.) What do you mean by trailing sheep through?

A. Driving them through the country.

Q. State whether or not sheep eat through the country when they are driven, or whether they do not.

A. They certainly eat; we figure on driving 8 miles a day, about 8 miles every night.

(Testimony of Charles D. Dorsey.)

Q. And they eat while they are driven? A. Yes.

Q. Will you state whose sheep those were, if you know?

A. Well, there was Stewart and Carter of Paradise Valley. There was Wheeler; Pedro Laca; and Bernard Brothers, and Thomas Nelson. And that is all that I know of that went through that section of the country at that time.

Q. Now, will you state from which direction those sheep were driven across that country, if you know?

A. Well, they came in right at what is known as the county road, crossed Rock Creek, and got in what was called the Long Ridge, and kept the Long Ridge clear through to a point about what they call Siawappe, probably 6 miles above the Willow Creek dam; and others cut off the other way in a northerly direction, and went out between the North field and Toejam Creek, and over into the reserve. [266]

Q. As I understand it, they came from a westerly direction, did they? A. Yes, sir.

Q. When you saw these sheep coming from that direction, and going in the direction which you stated, state whether or not there were any fences up along the west side of this so-called inclosure.

A. There were none at that time, no, sir.

Q. None at that time?

The COURT.—(Q.) Do you mean that four miles of fence was not there?

A. Oh, it was there, but I mean along the route taken by the sheep; of course they came along the fence, but didn't have to go through it.

(Recess until 1:30 P. M.)

(Testimony of Charles D. Dorsey.)

AFTERNOON SESSION.

CHARLES D. DORSEY, direct examination continued.

Mr. PLATT.—(Q.) Mr. Dorsey, while you were foreman, did you notice any other stock except sheep, that came from the west, and either grazed or were herded upon the so-called Government lands within the inclosure as represented upon the map?

A. Well, not particularly from the west; there was stock roaming those ranges from all directions.

Q. You say there was stock roaming the ranges from all directions? A. Yes, sir.

Q. That is, did you mean the ranges represented as Government land, within the inclosure?

A. Well, as I understand it, horses and cattle have the free run of the range every place, and of course they were grazing all over that country. [267]

Q. Then as I understand it, they came from all directions? A. Yes, sir.

Q. And were the cattle or horses belonging to any particular person, or did they belong to many people?

A. Well, they belonged to nearly everybody in that particular section of the county, that is, the cattle; and the horses there were a great many unbranded, classed as mustangs; and there was other range stock taken care of, and branded, belonging to the same parties that owned cattle around the country there.

Mr. PLATT.—You may cross-examine.

Cross-examination.

Mr. DENMAN.—(Q.) Mr. Dorsey, you spoke of a road that Tom Nelson used to travel; you mean that

(Testimony of Charles D. Dorsey.)

road that started somewhere down here below the reservoir?

A. In general below the reservoir, in here somewhere, just below the junction of this small creek with Willow Creek.

Q. And from there ran over and went out through this, about Opening No. 1, of the quaking-asps?

A. Yes, it went through, commenced here and went through this territory, up into this section.

Q. And it connected up with this road that runs in through by the quaking-asps, and goes off from Tuscarora, doesn't it?

The COURT.—That answer is very indefinite.

Mr. DENMAN.—I will connect it up in a moment.

A. There is a junction of two roads here, and the other one came down toward the dam, and then turned back to Tuscarora.

Q. That is to say, down in through this opening by the quaking-asps, and across the creek here, and down in this direction? A. Yes. [268]

Q. That is Opening No. A, go about through there, and run off towards Tuscarora to the east?

A. Opening No. A?

Q. Well, that is called A (indicating on plat).

A. Yes.

Q. Now, Mr. Dorsey, you say in the springtime during all the time you knew that country, there were large bands of sheep, owned principally by the Golconda Cattle Company and Tom Nelson, on land in this Government territory here? A. Yes, sir.

Q. And by the Government territory here, I mean—

(Testimony of Charles D. Dorsey.)

Mr. PLATT.—Just a moment.

Mr. DENMAN.—I have anticipated your objection. (Q.) And by the Government territory here I mean the Government territory on the white, included between these creeks; that is correct, is it?

A. Yes, sir.

Q. I am speaking all the time now prior to 1907, that you referred to? A. Yes.

Q. And also during that time there were large bands of sheep, or a great many, driven up the county road, through here, and across this Government land, going off, some of them into Toejam Mountain up there and some off to Tuscarora on the road?

A. Yes.

Q. And I suppose it is fair to say 150,000 to 200,000 sheep went through there in the springtime, is it not?

A. No, probably 90 to 100,000.

Q. Ninety to one hundred thousand sheep went through there? A. Yes.

Q. You say there is about two months green food there in the springtime over this territory?

Mr. PLATT.—He did not so testify, he didn't say anything about two months.

Mr. DENMAN.—All right, I withdraw the question.

Mr. PLATT.—I think he said from March until May, which might [269] be two or three months.

Mr. DENMAN.—(Q.) Well, the sheep cleaned it up in that time, from March until May?

A. Not necessarily; the sheep just lambed there, because it was warmer in this particular section of the country than it would be on their summer range,

(Testimony of Charles D. Dorsey.)

and they lambed them here to protect the lambs from the cold; later on drove them into the—

Q. The food gave out there?

A. Certainly, oh, yes, they could have stayed there all summer had there been more water and feed for them, without such long drives.

Mr. DENMAN.—That is all.

Mr. PLATT.—That is all. That is the Government's case in chief, if the Court please.

[Indorsed]: * * * Filed May 25, 1912. T. J. Edwards, Clerk. [270]

End Vol. 1.

VOLUME 2.

[Testimony of S. G. Lamb, for the Defendant.]

S. G. LAMB, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. Sheriff, what is your name?

A. S. G. Lamb.

Q. What is your occupation?

A. Sheriff of Humboldt county, Nevada.

Q. How long have you been sheriff of Humboldt county, Nevada? A. Nine years past.

Q. What was your occupation prior to that time?

A. Stockman.

Q. And where have you had experience with handling stock?

A. With Miller and Lux in California; with my father when I was a boy first, then went from there to Miller and Lux, then the Golconda Cattle Com-

(Testimony of S. G. Lamb.)

pany, and from the Golconda Cattle Company to Bliss Brothers.

Q. Are you familiar with this territory between Rock Creek, Toejam Creek, Willow Creek and Siawappe Creek? A. Yes, sir.

Q. Do you see it depicted on the map?

A. Yes.

Q. You have seen that map before, haven't you?

A. I have seen that map, I think it is the same map.

Q. Have you been over that country recently?

A. I was over there somewhere along about the 26th or 27th of last month.

Q. 27th of last month? A. Yes.

Q. Did you ride around those creeks, beginning at the junction of the southeast end of this map, and going to the north, covering the entire territory of the creeks, up to the—

Mr. PLATT.—Well, I object to the question on the ground it is leading. [271]

Mr. DENMAN.—I withdraw the question. (Q.) You say you were in that country about the 27th of last month; where did you go?

A. I went up Willow Creek, crossed Rock Creek and went up Willow Creek, up to the dam; from the dam I followed on up the creek up to Siawappe Corral; from there I followed on up the fence to where the telephone line crosses; from the telephone line I followed up to where there is a clump of trees, where Mr. Nelson's fence joins or comes close to the Pitchfork fence there, or rather the Golconda Cattle Company, there is an opening, and from there I followed

(Testimony of S. G. Lamb.)

on around to what used to be known as North's fence or Noble field, followed around to Toejam Creek, that fence where the gate goes in Toejam, and I followed on down Toejam Creek to Rock Creek, to where the old willow corral is, and from there I went on down to what they call Dutton now.

Q. That is, you followed down the creek?

A. Part of the way along the creek, and part on the outside of the creek.

Q. Could you observe the fences that had been constructed in any part of where you travelled?

A. Yes, sir, that was the idea that I went there.

Q. Let me call attention on this map first to a fence called North's fence, and I want to call your attention to that portion of it where it crosses Toejam Creek, and coming in a southeasterly direction around to the point of this red arrow, at the west end of what is called Opening No. 5; I want to call your attention to that fence.

A. Yes, sir.

Q. Describe the condition of that fence as you saw it when you went through there. I will check this up with its condition earlier.

Mr. PLATT.—I object to the question, if the Court please, upon [272] the ground that the question calls for an answer as to the condition of the fence at a time long subsequent to the filing of the complaint in this action.

Mr. DENMAN.—It is my intention to show that the fence was old and rotting down, and the condition it is now in, from its physical appearance would seem to be one in which it had been for some time, and I will connect it up with Mr. Osborne, who testified it

(Testimony of S. G. Lamb.)

was down something like two or three years ago in there.

Mr. PLATT.—I think, if the Court please, the testimony should be elicited in the regular order, because if the witness has no knowledge of the fence prior to the filing of the complaint, certainly the condition of the fence after that time, whether down or up, would not be material to the issues involved in this case.

The COURT.—I will allow the testimony subject to your objection.

Mr. PLATT.—We note an exception.

A. I found that fence down, in bad condition.

The COURT.—(Q.) What do you call that fence, the North fence? A. The North fence.

Mr. DENMAN.—It is marked on the map as “North’s fence.”

A. We rode across it various places, back and forth, going horseback down there.

Q. What was the condition of the wires?

Mr. PLATT.—Of course my objection goes to all this.

The COURT.—Yes.

A. Broke and rusted. * * *

Mr. DENMAN.—(Q.) Could you tell by the breaks in the wires how long they had been broken?

A. No, they looked like old breaks, could not say for how long.

Q. Were they rusted or not?

A. Yes, sir, they were rusted. [273]

Q. What could you say as to the condition of the posts as you saw them there at that time?

(Testimony of S. G. Lamb.)

A. They were redwood posts, good many of them in fair condition.

Q. And the others?

A. Some was in bad condition, rotted off, most of the posts was in very fair condition.

Q. Where the fence was down what was the condition of the posts?

A. The posts were also down where the fence was down.

Q. What can you say as to the condition of the posts that were down with reference to their being rotted or not rotted?

A. They were rotted, some of them were.

Q. How wide were those openings you saw there?

A. I didn't measure; some were big long openings; some, I guess, was probably two or three hundred yards; there was a large opening where we first came over there to the fence, I would not say how long the opening was; that opening was down along in here where we first came down, where it goes over a little gully going to Toejam Creek, a big opening there, and openings all the way down the fence.

Q. This was in section 31, township 40 north, range 49 east? A. Yes, along in there.

Q. How on the southern boundary of that section?

A. We went from Nelson's fence around up, and then crossed down that Noble fence.

Q. Where did you begin with reference to the west point of the arrow, Opening No. 5, whereabouts did you strike the fence?

A. Is this the fence here (indicating on plat)?

(Testimony of S. G. Lamb.)

Q. No. North's fence on this map runs from there to there, and from there to there (indicating on plat).

A. Well, I think we took the fence off about here somewhere.

Q. That is at the west point of the arrow?

A. Somewhere about there, yes. [274]

Q. And worked what direction along it?

A. Worked north and west.

Q. North and west? A. Yes.

Q. How many openings did you find in it?

A. Well, I didn't count them; it is nearly all openings, down every little ways.

Q. Will that fence hold cattle? A. No, sir.

Mr. PLATT.—Object on the ground it is calling for an opinion or conclusion of the witness.

The COURT.—I will allow the question.

Mr. PLATT.—Exception, if the Court please.

The COURT.—You may have an exception.

Mr. DENMAN.—(Q.) Now, coming easterly from that fence, looking up in the direction of this thing here called Toejam Mountain, is that where Toejam Mountain is located?

Mr. PLATT.—I object, if the Court please, on the ground it is a leading question; and counsel has been repeatedly asking leading questions.

Objection sustained.

Mr. DENMAN.—(Q.) Where, from the point, from this opening called Opening No. 5, in what direction does Toejam Mountain lie?

A. Toejam Mountain, I think lays northeast and southwest.

(Testimony of S. G. Lamb.)

Q. About how far from that opening; I am speaking of the mountain.

A. The Toejam Mountain?

Q. Yes.

A. The summit of that Toejam Mountain?

Q. Yes.

A. Oh, that must lay 3 or 4 miles across there, to the summit.

Q. Now, what can you say as to the country lying between this red line called Opening No. 5, and the territory for two miles east of there, as to the possibility of cattle passing through there? [275]

Mr. PLATT.—I object on the ground it calls for an opinion of the witness.

The COURT.—Just state the facts as you saw them, Mr. Lamb, in response to that question.

A. Why, cattle could pass through there most any place.

Mr. PLATT.—I move that the answer be stricken out on the ground it is a statement of a conclusion of the witness.

The COURT.—I think he had better state the facts, if he knows them, then he can give his opinion.

Mr. DENMAN.—(Q.) Sheriff, how often have you been through that country?

A. I have gathered cattle through there, rode through there, and worked through there.

The COURT.—That is not the place where the fence is down, that is an opening.

Mr. DENMAN.—I am asking what the condition of the country is from the line called Opening No. 5,

(Testimony of S. G. Lamb.)

for two miles east.

Mr. PLATT.—That was not your last question. Please read the question.

(The reporter reads the question.)

Mr. DENMAN.—(Q.) How many times have you been through that country?

A. I can answer directly; 1889 in there various times, we had cattle in there, worked out and in there several times with them; took them in in the summertime, when water was short we scattered our cattle out in there, got them located, and in the fall went in there riding, and getting them out again. I could not tell you how many times I was in that range. Then we worked cattle in there again, I think it was in 1903, camped in that country, worked there several days.

Q. So you are familiar with the shape and outline of the country? A. Yes, sir. [276]

Q. Now, I ask you again, what can you say as to the condition of the country lying easterly and north-easterly of Opening No. 5, for a distance of two miles, with reference to the passability of cattle through there?

A. Well, cattle can feed through there anywhere.

Mr. PLATT.—I object to the question on the ground the question infers an answer calling for the conclusion or opinion of the witness as to whether cattle could pass through that country; a conclusion or opinion which I think the Court should reach from an examination into the facts.

The COURT.—I will allow that answer to stand,

(Testimony of S. G. Lamb.)

because it seems to me this witness has shown sufficient experience with cattle to answer a question of that kind. I want to know something about the condition of the country, a few facts about the condition weighing more with me than the opinions.

Mr. DENMAN.—(Q.) Sheriff, what is the character of that country in there?

A. Rough, and a good stock country; a good summer range, always has been considered so; we always tried—

Mr. PLATT.—As to the considerations—I ask that “always considered so” be stricken out from the answer of the witness.

The COURT.—Well, the word “considered” may be stricken out, and give simply what you have seen yourself.

A. We always used it for a cow country, and tried to work our cattle in the high country every summer we have had cattle in there.

Mr. DENMAN.—(Q.) Describe the land itself lying easterly for two miles from this opening here, and in the opening itself?

A. It is all about the same.

Q. Well, what is that?

A. Low, rough, sparse hills with passes away through there, trails. [277]

Q. Could you drive a wagon through that country?

A. Well, I never did.

Q. Could you? A. I think I could.

Q. What can you say as to the character of the feed in there?

(Testimony of S. G. Lamb.)

A. The feed is good, as a usual thing.

Q. What can you say as to the destination of cattle drifting from the south, if cattle do drift from the south in the springtime, up towards the north in that country.

Mr. PLATT.—We object on the ground the question is leading.

Mr. DENMAN.—(Q.) What direction do the cattle drift from coming up from Humboldt in the spring-time, what general direction?

A. Drift principally north, that is, cattle coming from the River house, driving up that way, they drift north up through Rock Creek, up through that country. And cattle coming in from the other way, from toward the Ivanhoe, and the "25" cattle, they drift in toward, above the dam, along up that way towards the hill.

Q. Is there any natural barrier in there that would stop cattle from going through?

Mr. PLATT.—Object on the ground the question calls for a conclusion of law, as to what a natural barrier is.

The COURT.—I will allow the question.

Mr. PLATT.—Exception on the grounds stated in the objection.

A. There is nothing to stop cattle travelling through that passage there.

Mr. DENMAN.—(Q.) And on beyond it, on the other side, is there anything?

A. They can go on as far as they want to.

Q. Now, have you ever seen any cattle in that

(Testimony of S. G. Lamb.)

country? A. Yes, sir.

Q. How many?

A. We worked cattle in there, lots of cattle in that country.

Q. What do you mean by working, going after and bringing in? [278]

A. Yes, rodeo, and bring them in, drive up and down the country; had a lot of cattle in there one summer; them times before the hard winter there was thousands of cattle in that country then.

Q. Now, coming down on this map along a red fence line called Nelson's fence, to a place marked "Opening No. A," just above where Siawappe Creek divides, a place called "Opening No. A, 300 feet at Nelson's new fence line," did you find any fence to the south of Nelson's fence there?

A. There is an opening between the Nelson fence and the Golconda Cattle Company fence.

Q. Did you find any road there?

Mr. PLATT.—I object, if the Court please.

Mr. DENMAN.—Withdraw the question. (Q.)

What can you say as to the character of that country in there, in that opening, with reference to the possibility of cattle passing through?

A. Cattle could pass through.

Mr. PLATT.—Same objection as I have interposed; it calls for the opinion of the witness, and the question is not directed to the witness' knowledge of the country; and, in addition to that, calls for his opinion as to whether in his judgment cattle could pass through it.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—(Q.) What is the nature of the gap in the fence?

A. There is a gap there I should judge 250 or 300 feet.

The COURT.—(Q.) A gap of 300 feet?

A. Two hundred and fifty to three hundred feet, I didn't measure it, a big wide opening there.

Q. What is the nature of the country in the gap, the land in the gap?

A. Why a man could drive a wagon or anything right through there where the gap was.

Q. Did you drive a wagon through there?

A. No, sir.

Q. Did you see where wagons had been driven through there? [279]

A. I didn't notice where they had been; no, I didn't pay any particular notice.

Q. Let me ask you: Suppose cattle are drifting from the south, north, south of the black line marked as Nelson's fence, running east and west, and east of the line, red line, beginning at that gap and running down to the place called Siawappe corral, cattle wandering in there to the north, what can you say with reference to the natural line of travel for cattle in that gap?

Mr. PLATT.—Same objection, that it calls for a conclusion or opinion of the witness.

The COURT.—Same ruling and same exception.

A. I didn't see anything to keep cattle from drifting that way, looks like it would be a natural way for them to drift, as far as I could see.

(Testimony of S. G. Lamb.)

Q. What can you say with reference to Nelson's fence, directing them or not directing them in that direction? A. It would direct them to that gap.

Mr. PLATT.—Same objection.

The COURT.—Same ruling and same exception.

Mr. DENMAN.—(Q.) What can you say with reference to the fence I have just described on Siawappe, as directing them to that gap?

A. Well, they will naturally follow the creek bottom, and Nelson's fence would naturally act as a wing to catch cattle, and head them through that gap.

Q. Now, coming down to the opening called Opening No. 6, how wide is that Opening No. 6?

A. Oh, I didn't measure it, a quarter or half a mile wide, maybe wider.

The COURT.—(Q.) Half a mile wide?

A. I should judge a quarter or half a mile, I didn't measure it; quite an opening there, though. [280]

Q. Where do the cattle that are coming from the Humboldt country gather, or where do they come in with reference to the southerly side of this inclosure between these two creeks, Willow Creek with its extension of Siawappe, and Rock Creek with its extension to Toejam, where do the cattle come in from the south with reference to that land inclosed by those creeks?

Mr. PLATT.—I object to the question on the ground that witness has not testified that he has any knowledge as to what direction cattle come when they come from the south; and object further upon the ground that there is no distinction made between

(Testimony of S. G. Lamb.)

the fact as to whether the cattle were being driven in or wandering aimlessly in.

The COURT.—I will allow the question.

Mr. PLATT.—An exception, if the Court please.

A. The Bradley and Russell cattle always drift up on that side of Rock Creek.

Q. Rock Creek?

A. Up Rock Creek part of the way to Willow Creek, and follow that way.

Mr. PLATT.—(Q.) Up Rock Creek, where would you indicate that on the plat?

A. Rock Creek, and drift up through this country in this way (indicating).

Q. So I can understand that question: Do you mean Rock Creek as indicated on the plat?

A. Yes.

Q. Here is Rock Creek on the plat.

A. Rock Creek runs in down by 25, and the cattle drift up along, and hit Willow Creek.

Q. Drift up along Rock Creek and hit Willow Creek, and then where do they go?

A. Follow up Willow Creek, along through that neighborhood.

Q. I just wanted to understand your answer.

Mr. DENMAN.—(Q.) Let me ask you, what is the topography of the country, the shape of the country, with reference to its being [281] level or mountainous, to the south of Willow Creek?

Mr. PLATT.—I object on the ground that that land is not involved at all, and is without the inclosure.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—I want to show the drift of cattle This is without the inclosure; suppose there is high territory off in here, cattle would drift off that way to get in here; that is what I want to get at.

Mr. PLATT.—Do you admit that if there was high territory here the cattle would be turned, and drift in the other direction?

Mr. LEWERS.—Of course we do.

Mr. PLATT.—I would like the record to show that admission, if the Court please. I suppose that would be applicable to Toejam Mountain.

Mr. DENMAN.—No, there is feed in Toejam Mountain, and they go into the hills for the feed up there.

The COURT.—Do you still wish the question?

(The reporter reads the question.)

A. There is some very rough country down in here below the dam, and up in here (indicating).

Mr. PLATT.—I interpose the same objection.

The COURT.—It will be the same ruling and same exception.

Mr. DENMAN.—(Q.) You just pointed on the map to the reservoir here, and running across to the junction of the two creeks below.

A. Yes, sir, and down to the junction of the two creeks below.

Q. Where do the cattle drift as they come up in the spring-time, and as they are moving up into the higher country beyond, where would they come naturally?

Mr. PLATT.—I object on the ground that the

(Testimony of S. G. Lamb.)

question is too general; I don't know whether the high country beyond, or the witness knows, whether it means Toejam Mountain country, or the [282] country directly north of the plat.

Mr. DENMAN.—Of course that is testified to be level country by your witness Osborne, under your examination.

Mr. PLATT.—That has not anything to do with the testimony of this witness, or the legality of the questions being asked by counsel.

Mr. DENMAN.—I am following up my questions regarding the territory to the south of Willow Creek.

The COURT.—Read the question, please.

(The reporter reads the question.)

Mr. DENMAN.—That is with reference to the south line—

Mr. LEWERS.—In reference to Willow Creek.

Mr. DENMAN.—South line, or to the south of this blue strip here, on the south side of the map.

Mr. PLATT.—And of course the additional objection that it calls for the opinion of the witness.

The COURT.—Very well.

A. They would drag along this country here above this rough ground, and strike this open level country here, Hot Creek and up in Antelope, and where cattle drifts in that way.

Q. Where would they drift with reference to Opening No. 6, that you have just testified to?

A. They would naturally drift in about that country, cattle working up the spring of the year

(Testimony of S. G. Lamb.)

will follow a creek up, working up to the range, will follow the creek bottoms, and work up that way.

Q. What can you say with regard to the shape of the country around that opening, as to its being a valley, or mountainous, or what, right around this opening? A. Smooth ground.

Q. Is there anything around that smooth ground beyond it? What can you say with regard to that territory in there as a place [283] where cattle would or would not gather?

A. They would gather.

Q. What is there there; is there anything built in that neighborhood?

A. There is a fence above the gap and a fence below the gap.

Q. Anything else in that vicinity?

A. Sagebrush is about all.

A. Rodeo ground in there?

A. It is an old place for bunching cattle.

Q. As I understand your testimony, that is a point to which the cattle would naturally drift, and there is an old rodeo ground where they used to bunch the cattle in there?

A. Yes; I never bunched cattle right in that locality myself, we bunched up Siawappe Corral, most of our work, but it is understood as an old bunching ground.

Mr. PLATT.—It is understood my objection goes to all this.

Mr. DENMAN.—(Q.) Aside from that rodeo ground, what would you say as to the drift of cattle,

(Testimony of S. G. Lamb.)

would they drift up to that point?

A. Cattle naturally follow up a creek bottom, don't follow up a ridge.

Q. Are there any openings in this country that lead into that creek bottom? A. Which way?

Q. Coming up from the south.

A. There is a natural pass up in through there, nothing to stop cattle from going through there.

Q. There is a natural pass leading up to this opening? A. Yes.

Mr. LEWERS.—Make the record show where that is.

Mr. DENMAN.—That is from say a place marked "X" on the map, northerly? A. Yes, sir.

Q. Now, where is Antelope Creek from there, what direction or general direction? [284]

A. Antelope Creek is a little east of that.

Q. A little east? A. Yes.

Q. Where does Antelope Creek flow to; does it flow towards the Humboldt country, or back into the Willow Creek country?

A. Flows towards the Humboldt.

Q. What can you say with reference to Antelope Creek, as to the passage of cattle coming up from the south?

A. I never worked on Antelope Creek so much; the "25" boys always worked in there, we worked in above in that Squaw Valley country, in through there.

Mr. PLATT.—I don't know where Antelope Creek is in there, it is not depicted on the map.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—He says he has not worked in there. (Q.) You know about where it lays, don't you?

A. Yes.

Q. And you say the Russell boys worked over in there? A. Yes.

Mr. PLATT.—I ask that all this testimony be stricken out, the answer to the last question be stricken out, on the ground it is a leading question, incompetent, irrelevant and immaterial whether the Russell boys worked on Antelope Creek or not.

Mr. DENMAN.—He just said they had beforehand.

Mr. PLATT.—I ask that the answer be stricken out; I don't see what it has to do with this case.

Mr. DENMAN.—We will show later on; it is a matter of indifference whether it stays in or goes out.

The COURT.—If it is immaterial, it will go out then.

Mr. DENMAN.—At a later stage we will show it is material, and introduce further evidence. (Q.) Now, coming along this fence through Opening No. 7, 100 feet, and next to the word "Gate," what did you pass over, the county road there?

A. Yes, sir, that is supposed to be the road right up from [285] Willow Creek, I followed up there.

Q. How large is that gap where the road goes through?

Mr. PLATT.—It is a gate, as I understand it.

A. A lane through there.

(Testimony of S. G. Lamb.)

Mr. PLATT.—Marked “Gate” on the plat.

Mr. LEWERS.—I object to the interruptions unless they are in the form of objections.

Mr. PLATT.—Well, whatever it is, it is marked “Gate” on the plat; but whatever it is, I don’t care, I just want the truth, that is all.

Mr. LEWERS.—I object to the interruptions unless they are in the form of an objection addressed to the Court; an interruption to the witness, without addressing the Court with any objection.

Mr. DENMAN.—(Q.) How wide is that lane?

A. I don’t know; I measured, I can refer to a book.

Q. I just want general figures.

A. Somewhere 90 or 100 feet, I should judge.

Q. And what can you say as to the location of that gap with reference to cattle drifting up from the south towards the north in the springtime?

A. Why, it is right in line with everything drifting up from that creek, stock and everything drifting up from that creek.

Q. Now, I ask you with reference to this territory in here marked in white, inside the creeks, which we will call the Government land.

Mr. PLATT.—Well, you admit that it is, don’t you?

Mr. DENMAN.—Just let me finish my question. (Q.) What can you say as to the character of the feed in that territory?

A. There is some feed in that country early in the season.

(Testimony of S. G. Lamb.)

Q. How long does it last?

A. Well, the feed lasts there [286] longer than the water does; there is no water up in that country.

Q. About how long will the feed last?

A. Well, I suppose till June.

Q. Do you know whether or not any sheep lamb in this country?

A. Not to my knowledge; there may have been, but I never saw them in there.

Q. When was the last time you were in there, in June, May or June, how many years ago?

A. I think about 1902 or 1903 was the last time I was in there, that is in that time of year.

Q. How about April, is that true of April and March? A. No, I was not in there then.

Q. What can you say as to the character of the soil in the bottoms of these creeks, extending around from North's fence to the southerly, down to Toejam and Rock Creek?

A. The bottoms are good of both those creeks.

Q. What is the character of the soil?

A. Dark loamy soil.

Q. Good for agriculture? A. Yes, sir.

Q. Grow alfalfa?

A. Anything most, I guess, alfalfa and grain.

Q. And what can you say of the character of the soil when you get out of those bottoms?

A. Well, mountainous, rough; that is, it ain't farming land, grazing land would be all it would be.

Mr. PLATT.—(Q.) Do I understand you to say it was farming or grazing land?

(Testimony of S. G. Lamb.)

A. I said it was grazing land, not farming land.

Q. Grazing land? A. Yes, sir.

The COURT.—(Q.) Mr. Lamb, will you tell me again, I did not hear it, how wide the opening at No. 7 is, that is the last one you were asked about?

A. I should judge somewhere in the neighborhood of 100 feet. [287]

Mr. PLATT.—(Q.) That is where the road goes through, as I understand?

A. Yes, sir.

Mr. DENMAN.—(Q.) Now, for the purposes of the record, you made the statement that you had seen several thousand cattle up in this country?

A. Yes, sir.

Q. I ask you what you meant with regard to this country, with reference to the arrow at Opening No. 5?

A. Well, what I mean, I mean at the head of Rock Creek, and that country, and along the head of Toejam and Willow Creek and Siawappe, along that range of mountains along there.

Q. State with reference to this Opening No. 5 where these cattle went.

A. Up all through there; I seen cattle all along this range everywhere.

Q. I am asking you now with reference to the country northeasterly from that arrow?

A. I have seen cattle all through there everywhere; nowhere along there but what I have seen cattle all through that range.

Q. Now, with regard to the number of cattle you

(Testimony of S. G. Lamb.)

have seen to the northeasterly there, I don't want the exact number?

A. I could not say, only I have seen cattle all over there; as I told you 1889-1890 there was an awful lot of cattle in that country.

Q. And by "that country" you mean this country to the easterly of the red arrow? A. Yes, sir.

Q. Where do they range through there with reference to the land to the west?

A. Well, they ranged all over there, everywhere, there was no place but what there was cattle ranging in there. This man North, this fence was built in here to keep the cattle from drifting back in towards that valley.

Q. Towards this Government land?

A. Yes, sir, or any other place, Squaw Valley or any other place. [288]

Q. Now, we come in here to this opening, so-called, No. 1, what is that?

A. That is on Rock Creek; that is an opening we found there, wagon road runs through there; they told me it was a passageway for sheep.

Mr. PLATT.—I object to what was told him.

A. There is a passageway there.

Mr. DENMAN.—(Q.) Coming here to Opening No. 3, you found that there; or did you find any opening on this westerly line of fence, and about where, if you did; or is that where you came down the road?

A. Yes, I could locate myself on that map where I found a garden, right above this garden I found quite an opening.

(Testimony of S. G. Lamb.)

Q. Let me ask you about section 33 on Toejam with regard to opening.

Mr. PLATT.—What is the size of it?

Mr. DENMAN.—If he found any.

A. Well, I can't just locate myself with regard to the section, but all along this—is this on Rock Creek (indicating)?

Q. No, that is Toejam Creek; here is Rock Creek (indicates).

A. This is where the wagon road goes through; is that supposed to be the wagon road?

Q. No, that is the creek. A. This is the fence.

Q. Let me show you. The blue line is Toejam Creek, along here turns into Rock Creek, and comes down here to the left. Now, with regard to the fence as it is along Toejam Creek, did you find any opening there?

A. Yes, sir, I found an opening on Toejam Creek right above a little garden there, quite a large opening.

Q. About how large was it?

A. Oh, I could not state, probably 100 yards or so, maybe more or less, I could not say which, quite a big opening.

Q. And how about coming along further down, what other openings [289] did you find?

Mr. PLATT.—If the Court please, we have admitted all the openings on the plat. Our witnesses have testified to those openings; we don't admit, of course, some of them were there prior to the suit, but we do admit some of them were put there after

(Testimony of S. G. Lamb.)

the suit was brought.

Mr. DENMAN.—(Q.) Have you ever been in Gold Circle? A. Not since the town has been there.

Q. Do you know how far it is from this tract?

A. From this tract of land?

Q. Yes. A. To Gold Circle?

Q. Yes, do you know, as a matter of fact?

A. I don't know the miles, no, sir.

Mr. DENMAN.—I think that is all.

Cross-examination.

Mr. PLATT.—(Q.) When were you served with a subpoena in this case, Sheriff?

A. Served in this case?

Q. Yes, do you remember?

A. By the United States?

Q. Yes.

A. I can't remember just which day it was handed to me.

Q. Do you remember whether it was in February or March; this is the 8th of March, I think.

A. I kind of think it was in February, along about the 28th.

Q. Was it served after you got back from your examination? A. Yes, sir, just as I had got back.

Q. Who sent you out to take a look at the fences?

A. Who asked me to go out there?

Q. Yes.

A. Why, I could not say whether it was Mr. Petrie or—I think the notice I got was from Mr. Petrie first. [290]

Q. Who do you mean, the superintendent of the

(Testimony of S. G. Lamb.)

Golconda Cattle Company? A. Yes, sir.

Q. And they sent you out there with a view of examining the fences?

A. Going around that territory, yes, sir.

Q. And how long did you stay there?

A. I think we left Winnemucca the morning of the 26th, went up to Dutton.

Q. Who went with you?

A. Mr. Sheehan and Mr. Button went, I went from Winnemucca myself, and at Golconda we met Mr. Petrie, and I think Mr. Lewers.

Q. One of the counsel for the defendant?

A. Yes, sir.

Q. And how long did you stay up there?

A. We got up there about noon, went up around the fence to that gap at No. 1, on the 26th, came back the next morning, took the machine and went up Willow Creek.

Q. In the machine?

A. Yes, sir; up past the dam, up past that opening there, I forget just which one.

Q. No. 6.

A. Yes, that is the opening; on up above that, then took saddle-horses and followed along the creek to Siawappe Corral, around this country up here, down to North's fence, then on down to the Willow Corral on Rock Creek, and there we took the machine and came on back down.

Q. How long did it take you to make that circuit?

A. Around that field?

Q. Yes.

(Testimony of S. G. Lamb.)

A. I think we left, I would not be positive, I think we left that morning, we left Dutton about 7 o'clock, and I think we got around to the corral on Rock Creek—

Q. Where you started from, about?

A. No, we got around there, I think about 1:30.

Q. In the afternoon? A. Yes, sir.

Q. And then where did you go in the afternoon?

A. We went from there, followed on down the road, went on down [291] through Dutton, by Dutton on to Golconda, and from Golconda to Win-nemucca, that night, part of us did.

Q. As I understand it, you made the examination of the entire inclosure in one day, and got back to Golconda that night?

A. The fence, we made the examination of the fence and openings.

Q. Do you know about how long that fence is?

A. No, sir, I do not.

Q. Now, did you follow the main wagon road when you were in the automobile? A. Yes, sir.

Q. Stayed right in the machine, didn't you, until you took your saddle-horses?

A. Where them gaps was we got out and stepped across that gap there, right below the dam.

Q. By the way, you don't know when those gaps were built, do you? A. No, sir.

Q. You don't know whether they were put in after the suit was brought or before, do you? A. No.

Mr. DENMAN.—The testimony is, all that he has been examined on were put in before the suit.

(Testimony of S. G. Lamb.)

Mr. PLATT.—There is no such testimony from this witness.

Mr. DENMAN.—It is in evidence in the case.

Mr. PLATT.—I don't know about that, if the Court please. I think counsel is mistaken.

Q. Now, coming back to North's fence, you say part of that fence was down?

A. Quite a lot of it was down, yes, sir.

Q. You don't know who took it down, do you?

A. No, sir.

Q. You don't know when it was taken down, do you?

A. It wasn't taken down, it looked just like the—

Q. I don't care what it looks like, Sheriff. You don't know whether it was taken down, do you?

Mr. LEWERS.—I ask that the witness be permitted to explain the answer. [292]

The COURT.—(Q.) Did you wish to make any further explanation? A. Yes.

Mr. PLATT.—I asked if he knew whether the fence had been taken down, and I think I am entitled to an answer to that question before he is permitted to explain.

The COURT.—Ask the question.

Mr. PLATT.—(Q.) I asked you whether you knew if that North's fence, or any part of it, had been taken down? A. No, I do not.

The COURT.—Now, explain your answer.

A. It looked like the staples just fell out of it, and the wire fell down on the ground.

Mr. PLATT.—(Q.) That is what it looked like?

(Testimony of S. G. Lamb.)

A. That was the condition it was in.

Q. You don't know whether the staples had been pulled by anybody, and the wires taken off the posts, do you? A. No.

Q. Did you see any wires on the ground?

A. Lots of it.

Q. The wires running on the ground, as if the fence had toppled over itself? A. Looked that way.

Q. The wires were laying on the ground?

A. And many of them, what had not been broke was coiled up, and broke in different places; looked like an animal had probably stepped through, and got it on its foot, and broke it, or something might have moved it.

Q. It looked like it might have been moved by an animal or somebody?

A. That is the way it looked, something had moved it.

Q. You don't know whether that fence was in that condition or not, when this case was reported, do you? A. No, sir.

Q. Or when this case was brought?

A. I don't know when the case was brought.

Q. You are just testifying to what you saw upon that trip, as I understand it? A. Yes, sir. [293]

Q. Now, you testified it was natural for cattle, as I understand it, to follow up the creek bottoms, or along the sides of the creeks?

A. Yes, sir, that is natural for cattle, working up in the spring of the year, and in the fall going back, they continue down the creeks and things.

(Testimony of S. G. Lamb.)

Q. Did you ever see any cattle starting in to work up Rock Creek and Willow Creek, and beginning somewhere at their confluence, down at the southwest corner of this plat?

A. No. I can explain. I didn't work in so much south, or down that Rock Creek where it went into the gorge and Willow Creek came in, that was on the Bradley and Russell range, that was a dividing range between their ranch and our ranch; I worked Squaw Valley, and kept along that country with my wagon to the Siawappe Corral, I would leave my wagon at the Willow Corral in Willow Creek, and then I would cross over there to Siawappe, and punch, and Russell would have his wagon there, and we would work our cattle; they went towards Battle Mountain with their cattle, and we went towards Golconda.

Q. Your work was more properly on the eastern side of this plat, as I understand it?

A. Up Willow Creek, Toejam, Siawappe, Scraper Springs, and into the head of Rock Creek from there.

Q. Now, Sheriff Lamb, if cattle should work their way along Willow Creek, beginning about at a point between the junction of Rock and Willow Creek, would it not be natural for them to follow along the creek-bed, as you say?

A. Not for a ways there, it is very rocky.

Q. Where is it rocky?

A. Up where the creek goes into the canyon, that is the fork of Rock Creek, where it runs down into what they call the gorge.

Q. Is that gorge within any territory represented

(Testimony of S. G. Lamb.)

upon the map? [294] It is way down further southwest, is it not? A. Yes, it is further south.

The COURT.—(Q.) It is below the junction?

A. Yes, sir, it is below the junction.

Q. (Mr. PLATT.) Suppose the cattle started to work their way north or northeasterly, and started at a point represented by the extreme southwestern corner of this plat, would it be natural for them to work their way along from Rock or Willow Creek?

A. There ain't many cattle comes in that way; it would be natural if they were in that way to work up the creek; where cattle can't work up a creek on account of rocks and things, they will follow around.

Q. Cattle starting there, would it not be natural for them to work their way up along these creeks?

A. It is natural for them to work their way up along the creeks, yes, sir.

Q. Have you ever seen any cattle start to working their way up the creek, beginning at a point known as Ivanhoe Creek? A. Ivanhood.

Q. It is "Ivanhoe" on this plat.

A. I don't know it by that name, I know where it comes in.

Q. Any creek relatively in the same position as Ivanhoe Creek? A. I can't say that I have.

Q. You don't know. Are you familiar with that country there?

A. Not that far down, not down that far; no, I am more familiar above the lake, and along that country in through there, and up Rock Creek, and that way.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—(Q.) By the “lake” you mean the reservoir?

A. Yes.

Mr. PLATT.—(Q.) You don’t know then, Sheriff, do you, whether as a matter of fact, that is, from actual experience and knowledge, it would be natural for cattle to gather at any point below [295] or west of Opening No. 6?

A. I know that is a natural place there; it always was; we worked in that country there; that was a rough country down in there, didn’t come in much with cattle; cattle couldn’t water in that country, and didn’t stop down in that country much; they would come in Siawappe Corral, work that way, and come in from Rock Creek, and bunch in there.

Q. You know that section of country in the neighborhood of Opening No. 6, was a natural place for cattle, you testified to that? A. Yes.

Q. But you don’t say there were any points west of there that were not natural places for cattle to come in; that is, from your knowledge and experience, and without guesswork?

A. No, above the dam there is some natural passes, but below the dam I don’t know.

Q. You don’t know, do you?

A. No, I am not positive of that country that low down there; it is rough in there and we didn’t work in there.

Q. You didn’t work in there? A. No, sir.

Q. Do you know anything about the country through which Rock Creek flows? A. Yes, sir.

(Testimony of S. G. Lamb.)

Q. All this western border? A. Yes, sir.

Q. Were there any natural places along here, along this western border, for cattle to congregate, and work their way through toward the east?

A. They could go through there anywhere.

Q. Anywhere? A. Yes.

Q. As I understand it, if cattle were wandering aimlessly, or being driven or herded, it was perfectly logical, natural and easy for them to have crossed this Government land within the inclosure, if they had gone through any place along the west line of that inclosure?

A. Yes, sir, they could have gone across there anywhere. [296]

Q. There is no question about that, is there?

A. No, sir, I don't think so, not that I know of.

Q. Now, suppose, Sheriff, that this western side of this Government tract were completely fenced in, what would be the natural course of cattle, in the event they were herded or grazed from the west, and were being driven toward the east, where would they go?

A. Cattle always from that side work up towards the Scraper Spring country, and up in that way.

Q. Where is that? A. It is off to the north.

Q. Is it on the plat? A. No.

Q. I am not calling your attention to anything that is not visible on the plat.

A. I don't think cattle would work across that.

Q. I ask you the question, Sheriff, you stated anywhere along the western border of this plat would be

(Testimony of S. G. Lamb.)

a natural and logical place for cattle to go through toward the east?

A. They could if any cattle drifted in that way; they could go in that way anywhere.

Q. Now, assuming that there were a bunch of cattle, say at a point marked 21 upon the western extremity of the plat, and somebody was driving them, and it was the intention of the person to drive them across this inclosure so that they might graze within this Government land, and they were stopped by an obstruction known as a fence, and could not get through, would it not be necessary for those cattle to be driven along the line of fence until some opening might be found so that they could be driven through?

A. I expect they would have to; if he was driving along the fence he would have to find an opening to get them in.

Q. Have to find an opening to get them in?

A. Yes, sir.

Q. Then as I understand it, if anybody owning cattle or sheep were driving them from the west toward the east, and ran up to [297] any place or point along the west side of this plat, and did not find an opening, it would be necessary for him to go around the inclosure until he found an opening to get into, would it not? A. I expect so.

Q. You would do that if you were a cattle driver, wouldn't you?

A. No, I would drive to where those gates were put in, I would know where I was going; I would not be going at random; if I was going up against that field

(Testimony of S. G. Lamb.)

with a bunch of cattle, I would know where an opening was before I hit it.

Q. Suppose you were a stranger in the country and were driving cattle across there?

A. I don't know, I never was in that fix exactly. Of course I have butted up against fences different times. In 1889 when I went in that country I went in with a big band of cattle, went up against Noble's fence, didn't strike no gate, simply found a little sag, raised up two or three wires, took the cattle under, and put the fence up, and went on.

Q. You took the fence down so the cattle could get through? A. Yes, sir.

Q. Did you in your experience upon the ranch ever know of any cattle or sheep being driven from the west toward the east into this inclosure represented by the Government lands? A. No, sir.

Q. In all your experience you have never seen any?

A. No.

Q. Had you ever seen any being driven from the north? A. Yes.

Q. Whose cattle were they?

A. Golconda Company's cattle.

Q. Did you ever see anybody else's?

A. I have seen Noble's and old man North's, Russell's; they drove from Siawappe down that way; we would take ours the other way; we always split up there, either at Willow Creek or Siawappe.

Q. Did you ever see any cattle or sheep grazing upon the land represented upon the plat as Government land, and within that so-called inclosure?

(Testimony of S. G. Lamb.)

A. I have seen cattle in there, yes, sir. [298]

Q. Whose cattle?

A. Bradley's, Russell's, Golconda Cattle Company, P. Bench, Palo Alto; different outfits, could not say all. That is when I was working in that country, I saw none the other day.

Q. You saw them grazing on this Government land, didn't you? A. Land in that territory, yes, sir.

Q. And away from the creeks, didn't you?

A. Not in the summer-time, not very far away.

Q. Winter-time?

A. I didn't stay there in the winter; sometimes early in the spring of the year I saw cattle in there.

Q. Early in the spring of the year you saw cattle grazing years ago in there?

A. Along the creeks, not very far out; it is a dry territory in there, outside of the creeks.

Q. Do you say in the spring this is not good grazing land?

A. It is very good grazing land in the spring of the year.

Q. Now, you say it is a natural way for cattle to drift northerly from this southern gap, No. 6; I ask you if it is not a natural way for cattle to graze south from a point Opening B., or from a point Opening No. 4, or east from a point Opening No. 3, or from a point Opening No. 1?

Mr. DENMAN.—You mean across the Government territory?

Mr. PLATT.—Yes.

A. Well, you see when cattle gets up in that high

(Testimony of S. G. Lamb.)

country the snow is all gone, the cattle naturally would not drift back to that dry country any time; cattle leaving that high range in that time of the year, they are drifting straight back to the Humboldt River.

Q. Where is the Humboldt River relative to that plat? A. It is southwest.

Q. Southwest of the plat?

A. West and southwest.

Q. Do you know how many miles it is, Sheriff, from that southwest [299] corner of this plat to Opening No. 6? A. No, I don't know that.

Q. You testified that you knew that North's fence was built for the purpose of keeping cattle from grazing upon this Government land?

A. No, to keep them from drifting down into that country.

Q. What do you mean by to keep them from drifting down into that country?

A. That country down there was dry along Rock Creek, and cattle drifted down in there, so he built that for a steer field, and there is no fence on the north part of that, there was no fence up there, just a kind of a drift fence, and he used to put his cattle up there, and keep them on good feed, and keep them salted, because it was watered, and a good place for steers, he built that for that purpose.

Q. Was it natural for the cattle to drift down this Government land?

A. Follow down Rock Creek, and water is scarce there, and drift back in towards the Humboldt River.

(Testimony of S. G. Lamb.)

Q. So he put up this fence to keep them from drifting that way? A. Used it for a steer field.

Q. You know that of your own knowledge, do you?

A. Yes, sir.

Q. What is the general trend or slope of the country and tendency of the country as to elevation, beginning from the southwest corner of the plat, up to and extending to a place marked "Toejam Mountain"?

A. Well, it is a pretty gradual raise from there all the way up, one side slopes off towards Rock Creek, the other side slopes towards Toejam and Siawappe country.

Q. But it continues to rise, does it not?

A. Yes, sir.

Q. Do you know who owns this land indicated in the blue near the Toejam Mountain? A. No, sir.

Q. What is on the other side of Toejam Mountain, do you know?

A. Range, just about the same as on that side, on the other side [300] of the slope.

Q. Is it a private range or public range?

A. I don't know.

Q. You don't know? A. No, sir.

Q. Do you know whether it is Government land or private land? A. No, sir.

Mr. PLATT.—I think that is all.

Redirect Examination.

Mr. DENMAN.—(Q.) Sheriff, you were asked about ranging cattle on the west side; I didn't ask about that but Mr. Platt did. What is the general

(Testimony of S. G. Lamb.)

direction in which cattle range on the west side of this fence; where do they go to?

A. They range up in that Scrapper Spring country, and up in the high ranges, and over towards Oregon Canyon, towards that way.

Q. North and northwesterly direction? A. Yes.

Q. Cattle in this high country, you said they return down Rock Creek and Toejam? A. Yes.

Q. Do they come across Rock Creek and come onto the Government territory, when they are returning in the fall?

A. No, generally string right down the creek bottoms.

Q. What is the reason?

A. On account of the water and trails along them springs, is why they follow them down.

Q. That is along the general blue line?

A. They follow the creek bottom, yes, sir.

Q. I am talking about this space of 40's, you see.

A. Yes.

Q. Along that blue line, down in a general westerly and southwesterly direction?

A. Yes, sir, that is the way cattle come.

Q. I understood you to say no cattle were worked from west, east, to try to get onto this Government land? [301]

A. Why, no, I never knew of cattle worked that way; they always worked the other way, they worked north, instead of working down into that country. There was a hot spring up there, used to be a few cattle hung around that in the summer-time, on Rock Creek.

(Testimony of S. G. Lamb.)

Q. It is on the land of the Company, is it not?

A. It is in there right close, I don't know the number of the section, I know where the spring is.

Q. It is on the Company's land, is it not?

A. I don't know, only one spring there, a big spring.

Q. Well, we will determine that later on. When you said cattle coming from this north country started back to the Humboldt, you referred to starting down the creek?

A. They would probably come down there about to where we call Dutton now, outside there, then take and cross over to Spring Creek, then on down to Summit Creek, then down to Humboldt.

Q. Coming down this side where would cattle go?

A. On this easterly side, they don't follow down—there is a few might follow down and go into the canyon below Squaw Valley house.

Q. That is to say the canyon on Rock Creek to the southwesterly of this map?

A. Come from the gorge and go toward Eisner.

Q. What would you say as to the proportion of cattle coming from the north and the proportion going easterly towards Antelope Creek?

A. The bulk go towards Antelope Creek, natural way for them to go over that way.

Q. That is true about coming up the same way?

A. I should think it would be; I didn't work in that Antelope country, it was out of our country to follow that country down to work; that is the Bradley and Russell range.

(Testimony of S. G. Lamb.)

Mr. DENMAN.—If the Court please, my associate is more familiar with this topography to the extreme south than I am, and I would like to have the rule waived, and ask that he examine the witness [302] further on this point.

The COURT.—Very well.

Mr. LEWERS.—(Q.) Mr. Lamb, are you familiar with the lower end of Squaw Valley, below the Lake field? A. Yes, sir.

Q. State what is the character of the mountain, if there is any down there.

A. There is a big gorge down through that canyon, and big rim-rock on each side.

Q. Is that the gorge to which you have referred, through which Rock Creek runs? A. Yes, sir.

Q. How high is that rim-rock down there at the lower end of that ranch, approximately?

A. Oh, I don't know, it must be 3 or 4 or 5 hundred feet in some places, it is very high, or more.

Q. A precipice, you mean? A. Yes, sir.

Q. And does that extend around to the south of the Dutton house? A. Yes, sir.

Q. And how far does it extend toward the east, toward Ivanhoe Creek?

A. Well, it extends along up there, pretty well along up that bluff, towards the lake quite a ways, I could not say just how far it continued up there, a solid bluff, though, of course there is breaks in it; it is a very rough mountain on there.

Q. By towards the lake, you mean the artificial reservoir on Willow Creek? A. Yes.

(Testimony of S. G. Lamb.)

Q. Is that the high mountain that you have referred to as being the one below which, or to the south of which cattle are driven, and which come in up toward the reservoir? A. Yes, sir.

Q. Now from what country do those cattle come?

A. They come from down the Bradley and Russell country, towards Battle Mountain, "25" ranch.

Mr. PLATT.—Do you testify they come from there now, or do you testify that you know they came from there 15 years ago? [303]

A. I know the same firm is there yet, and I know that is their range that they run cattle in, that is at the present time, that is all I know about it.

Mr. LEWERS.—I prefer not to be interrupted, unless there is an objection to the question.

Mr. PLATT.—I was asking the question to lay the foundation for a question. I am asking as to whether the witness is testifying to his knowledge 15 years ago, or present knowledge from present conditions.

The COURT.—Well, if you have an objection you can make it.

Mr. PLATT.—I move that the answer be stricken out, and I interpose an objection to the question on the ground that the question is too indefinite, not being directed to any knowledge which the witness had at the time this suit was brought, or any reasonable time prior thereto.

The COURT.—I will overrule that objection. You can cross-examine him as to that.

Mr. PLATT.—I ask for an exception on the grounds stated in the objection.

(Testimony of S. G. Lamb.)

Mr. LEWERS.—(Q.) Now, going in the other direction, state whether or not that high precipice, or barrier, or mountain that you say is to the southwest of the Dutton Ranch extends over to any extent toward Golconda.

A. Southwest of the Dutton Ranch.

Mr. PLATT.—I object to the question on the ground it is leading.

Objection sustained.

Mr. LEWERS.—(Q.) What direction does it extend? A. It is southeast of the Dutton Ranch.

Q. And do you know where the road or roads, whatever there may be, from Golconda come into the Squaw Valley? A. Yes. [304]

Q. How many roads are there?

A. Comes into Squaw Valley?

Q. Yes.

A. Two from Golconda; one comes in by Spring Creek, and the other comes in by what they call the Indian Springs.

Q. State whether or not those roads come together at any place. A. They do.

Q. Where?

A. Right close to the Dutton house on the outside of the fence there.

Q. And after they come together does the road when united come onto this plat shown in Government's Exhibit No. 1?

Mr. PLATT.—I don't want to keep interposing objections all the time, it seems to me that is another manifestly leading question.

(Testimony of S. G. Lamb.)

Mr. LEWERS.—State whether or not it does; it is only preliminary. You don't deny it, I suppose.

The COURT.—I don't know the purpose of this.

Mr. LEWERS.—Merely for the purpose of showing the connection between the road that goes through there, and that territory to the west.

Mr. PLATT.—I think, your Honor, it is a leading question.

Mr. LEWERS.—I withdraw the question.

Q. Mr. Lamb, are you familiar with any road leading through this plat? A. Yes, sir.

Q. What road is that?

Mr. PLATT.—I object on the ground it is improper redirect examination; it is not based upon any questions asked in the cross-examination.

The COURT.—I will permit this.

A. There is three different ways or four you could get in there.

Mr. LEWERS.—(Q.) The question is, what road is that?

A. That is the road, that is one of the roads that come in from [305] Golconda, you can follow right in from Golconda, and go in through there, follow up Toejam and go in that way, or go in by the Dutton place; you can continue up Rock Creek two or three different roads, you can follow in.

Q. In coming in over the roads you have mentioned from Golconda, what portion of the Squaw Valley Ranch shown on this plat would you strike in traveling with a team or automobile? Do you understand the question?

(Testimony of S. G. Lamb.)

A. I don't exactly. Which part would you strike?

Q. Yes, by this plat; where would you come in to the land shown on this plat in travelling by team from Golconda?

Mr. DENMAN.—The regular travelled route.

A. Where would you come; you mean where you would come in at the house?

Mr. LEWERS.—(Q.) No, where would you strike the territory shown on this plat?

A. Strike it there at that Opening No. 1.

The COURT.—What is the point to which this testimony is directed?

Mr. LEWERS.—That the natural course of travel into this country is through this opening. That is, that the public roads from the various places converge onto this public road.

Mr. PLATT.—I will admit, if the Court please, a person travelling in a buggy or automobile would not travel on anything but a public road; I think it must be preferable to travelling through the sagebrush; I think that is quite manifest.

Mr. LEWERS.—That is not what we are trying to prove.

Mr. PLATT.—I cannot see how it is material to any issue. Sheep or cattle are not driven across roads usually.

The COURT.—Is it the ultimate purpose of this testimony to prove that the fence down at the southwest corner of that tract is not an obstruction, because no cattle, or no person seeking [306] to cross that territory would ever go there?

(Testimony of S. G. Lamb.)

Mr. LEWERS.—No; that no person seeking to come into this territory would ever go anywhere except through that lane, that is the point.

The COURT.—How about cattle wandering over the range?

Mr. LEWERS.—I am first taking up the question of homesteaders moving their paraphernalia in there.

Mr. PLATT.—I will admit the homesteader could jump the fence and could take a look, for that matter, but I do not see how that is material to the issues here. The material to homesteaders is when a homesteader comes to that field, and takes a look and sees the field is inclosed, he says to himself somebody else owns that, there is no chance for me to get in there.

The COURT.—I am going to let this in, if you have a point in it. I don't really see the materiality of it. I am not deciding it at all. I am going to let you put it in, but it will go in subject to Mr. Platt's objection, and will be considered later the same as other testimony. You have evidently prepared yourself for that line of examination because you believe it had a bearing on this case, and I prefer that you get it in; but I simply asked that question because I wanted to know in advance what you were directing the testimony, to what point you contend it is material.

Mr. LEWERS.—I will illustrate by this, that the purpose of this testimony, together with other testimony which we have introduced and will introduce, is to show that approaching that country from any bearing or possible angle permitted by the surrounding country, will lead you right into that without any

(Testimony of S. G. Lamb.)

obstruction. That is the purpose.

Q. Now, Mr. Lamb, do you know where the road is that runs up to Midas or Gold Circle?

A. Yes, sir. [307]

The COURT.—I presume Mr. Platt will admit considerable of that.

Mr. PLATT.—I will admit all the county roads.

The COURT.—What the natural lines of travel into that territory are.

Mr. PLATT.—I have never been over them, and I don't think I have been over this one, but for the purposes of the case I am willing to admit all the county and public roads in that neighborhood, if it will save any time.

Mr. LEWERS.—Will you admit that the road from Midas or Gold Circle and the road from Golconda, and the road from Battle Mountain, all converge and come into the public road which leads through Opening No. 1?

Mr. PLATT.—No, I won't admit that they all converge, but I will admit this, that anybody who is going or coming from one of the points mentioned by counsel, and going to Midas, that he will find a road from the point of the starting of his journey, which will connect with the road to Midas, and that main road to Midas is the main road depicted on that plat; but I will not admit all those roads converge into that road, because I don't think they do.

Mr. LEWERS.—I will state again, and perhaps you will concede it, that the road leading from Winemucca and that from Golconda and that from

(Testimony of S. G. Lamb.)

Battle Mountain, and also the road leading from Midas or Gold Circle toward the east, all come together onto the public road, passing through Opening No. 1.

Mr. PLATT.—Let me understand you, do you contend that each one of these separate roads all come together at one point?

Mr. LEWERS.—No.

Mr. DENMAN.—Will you concede the shortest travelled route from Golconda to Tuscarora, from Winnemucca to Tuscarora and from Midas [308] to Tuscarora, and from Battle Mountain to Tuscarora, is through Squaw Valley, and through this lane, No. 1?

Mr. PLATT.—Well, for the purposes of this case, I see no objection to admitting that. I don't see anything material about it.

Mr. DENMAN.—We simply want to show the travelled routes.

Mr. PLATT.—That is a different proposition from all roads converging in that other road.

Mr. LEWERS.—That is all.

The COURT.—(Q.) Mr. Lamb, I would like to ask a little more about that North fence, how long is it? A. That North fence?

Q. Yes.

A. You mean the old fence that belongs to North?

Q. Yes, the one you were talking about.

A. I can't say how many miles it is; it follows up Rock Creek, runs up there, and it quits there, when I was there, no end to it; then follows the other way

(Testimony of S. G. Lamb.)

to Toejam, and then to the head of them Toejam Mountains, and that north part when I worked in there was vacant, or so anything could go east in that country, no fence across Rock Creek in my time working in there, or back of the Walker place; cattle could go up that way anywhere they wanted to, nothing to stop them. That fence on the lower end towards Squaw Valley, just a fence old man North put there to keep anything from drifting down.

Q. About how long was that fence?

A. That fence, 10 or 12 miles long, maybe more.

Q. Is it still 10 or 12 miles long?

A. Could not say, haven't been around it, for certain.

Q. Is it a straight fence?

A. No, sir, kind of runs from north to south, and follows Rock Creek, then runs an easterly direction.

[309]

Q. Not an inclosure, but simply to keep cattle from drifting?

A. Not in my time; not an inclosure.

Q. You say you found the wires down; how many wires were there on the fence originally?

A. I believe there was four.

Q. Were the wires all down?

A. In these places?

Q. Yes. A. Yes, sir; all of them down.

Q. How wide a space were they down?

A. Oh, spaces there probably a block long, some more.

Q. What kind of a block?

(Testimony of S. G. Lamb.)

A. What we call a block in the street, probably 300 or 400 feet, in places it was all down.

Q. Then spaces for how long where the fence was up?

A. Some places probably be a quarter of a mile, half a mile, maybe a mile some places, I would not say a mile. It seemed to me there was as much fence down as there was up; it seemed to be in pretty bad condition.

Q. Were the posts down? A. On the ground?

Q. Yes.

A. No, most of the posts was up, sometimes posts were down; most of the posts were standing up.

Q. Where you found the openings for a block, were the wires entirely down, or were some of the wires on at one post, and down on the next?

A. The biggest part of them down on the ground.

Q. They were taken down clean?

A. Most of the places they were clear down.

Q. Did you see many places where they were not clear down, where one wire would be up?

A. Yes, sir; some places.

Q. Be on one post, and down on the posts on each side of it? A. Yes.

Q. Did you see any where the upper wire was still on?

A. Well, I could not just remember whether I took particular notice of that; but I took more notice of where they was down entirely, and the conditions of the fence, and I would not be [310] positive whether I saw a place where there was a top wire and

(Testimony of S. G. Lamb.)

two down, I would not be sure.

Q. Did you see any place where there was anything to indicate that the wires had been pulled down?

A. No, I could not say I could.

Q. Did you see anything more there than you have already given us that would indicate that the wires fell of their own weight? A. No, I could not.

The COURT.—That is all.

Mr. LEWERS.—(Q.) In that connection: What was the condition of the wire, Mr. Lamb?

A. The condition of the wire?

Q. Yes. A. In what respect do you mean?

Q. Well, as to its being new or old, what condition was it in? A. It was old wire.

The COURT.—He has testified it was old wire, and rusted.

A. I knew the fence there myself in 1889, and the fence that was there when I went through there in 1889, the same fence, when I worked there; I don't think at that time, though, it was a very old fence.

Mr. LEWERS.—That is all.

Mr. PLATT.—No questions, if the Court please.

[311]

Testimony of George Russell, Jr., for the Defendant.

GEORGE RUSSELL, Jr., called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. What is your full name, Mr. Russell?

A. George Russell, Jr.

(Testimony of George Russell, Jr.)

Q. Where do you live? A. Elko, Nevada.

Q. How long have you lived there?

A. Well, for about 32 years.

Q. You were born there, weren't you?

A. Yes, sir.

Q. What is your business? A. Stock business.

Q. How long have you been in the stock business?

A. Well, I have been engaged in that since 1899.

Q. Since 1899? A. Yes, sir.

Q. Some 12 or 13 years? A. Yes.

Q. Are you familiar with the country inclosed by Willow Creek and Siawappe on the south, and Rock Creek and Toejam on the north? A. Yes.

Q. How long have you been familiar with that country?

A. 1896 was the first time I was there, I believe.

Q. Been going there ever since? A. Yes.

Q. What interests have you there in that country, if any?

A. The corporation I am interested in owns land there in that vicinity, and run cattle and horses.

Q. Are you familiar with the territory extending from the junction of Willow Creek and Rock Creek, along Willow Creek up Siawappe to Toejam Mountain country? A. Yes.

Q. Worked cattle in through that country?

A. Yes.

Q. Let me ask you what the character of the land is with reference to elevation, or roughness, or smoothness, south of Willow [312] Creek from its junction with Rock Creek, and extending over to the

(Testimony of George Russell, Jr.)

neighborhood of the reservoir?

A. Well, there is a large mountain that extends from the dam, opposite the dam, which would be south, to the pass, what they call Butte Creek, where Butte Creek intercepts Willow Creek, a few miles north of the junction of Rock Creek and Willow Creek.

Q. Are you familiar with the movement of cattle from the south toward Willow Creek country?

A. Yes.

Q. Can you tell where cattle naturally pass coming up in the spring-time, with reference to where they would strike the south boundary of this blue inclosed territory here?

Mr. PLATT.—For the purpose of preserving the record, I object to the question on the ground it calls for a conclusion of the witness or opinion of the witness. I ask the same ruling and exception may be noted.

The COURT.—Yes. You might just as well qualify this witness to show that he does know that country.

Mr. DENMAN.—(Q.) You worked all through this country here? A. Yes.

Q. Worked cattle in there many years?

A. Yes.

Q. I thought I had put that question.

The COURT.—Perhaps you had, but it escaped my memory.

Mr. PLATT.—I objected to the question on the ground it called for the opinion or conclusion of the

(Testimony of George Russell, Jr.)

witness as to the natural tendencies of cattle to graze in certain directions.

The COURT.—Same ruling and exception.

Mr. DENMAN.—(Q.) Answer.

A. Well, there are two ways; one way they go up Willow Creek, and another way they go out through what we call the Hot Creek Pass. [313]

Q. Relatively as to the number, which route is followed by the greater number of cattle?

A. Well, I should judge, through the Hot Creek Pass.

Q. Where would that bring them on this map with reference to Opening No. 6?

A. Well, they would pass down over what we call the Hot Creek rodeo ground, over Hot Creek, and strike Willow Creek on the rodeo ground we have there, where the Russell Land and Cattle Company own a couple of 40's on the creek there.

Q. Is that the natural pass for them coming through there?

A. That is practically the natural way.

Q. When driving cattle in that country, where would you bring them to when you desired to take them into this northern country?

A. We generally bunched them at that rodeo ground on those two 40's, I forget what the description of that land is.

Q. Now, let me ask you with reference to that turn, the creek, where it is with reference to the creek where Willow Creek turns north?

A. I judge it would be a mile south.

(Testimony of George Russell, Jr.)

Q. Do you know of any opening in that fence there? A. Yes.

Q. Where with reference to the opening?

A. That opening in the fence bounds those two 40's.

Q. How wide is that opening?

A. I should judge it is about a half mile.

Q. Now, you say that in driving cattle through this country up Willow Creek or elsewhere, that you drive to reach that rodeo ground, is that correct?

A. Yes.

Q. And from there you turn the cattle loose?

A. Yes, sir.

Q. Now, do you know where the county road crosses there? A. Crosses the creek?

Q. No, do you know where it crosses the fence?

A. Yes, sir, I know about where it does. [314]

Q. What can you say with reference to that being an opening that would be availed of or not by cattle coming up from the south in this direction?

Mr. PLATT.—Same objection, on the ground it calls for an opinion or conclusion of the witness.

The COURT.—Same ruling, and same exception.

A. Why, cattle coming up along the creek there, I should judge, could go through there all right in that opening, as I saw it last year, last July it was.

Q. Were you in that country in the spring of last year? A. Yes, sir.

Q. When, along in April or May?

Mr. PLATT.—I think we have had enough leading questions, if the Court please.

(Testimony of George Russell, Jr.)

Mr. DENMAN.—(Q.) Well, at what time?

A. The latter part of June.

Q. Were you in this territory in here? (Indicates on plat.) A. I was.

Q. See any cattle in there? A. I did.

Q. What brands did you see in there at that time?

A. I saw cattle branded with the "25," with the pitchfork, and I saw some Tuscarora cattle in there belonging to Mr. Fairchilds, and some of those other ranchers, a few.

Q. How many brands altogether did you see?

A. Well, I saw, I think, probably 5 or 6 brands; something like that.

Mr. PLATT.—In there, you mean on the Government land?

A. Yes, sir; I don't know whether it is entirely Government land, but within that space there between Rock Creek and Willow Creek.

Q. (Mr. DENMAN.) You say you don't know about the Government land; [315] where is the natural place for them to travel as between the creeks in this sagebrush upland here, where is the natural place for the cattle to travel, moving north?

Same objection, ruling and exception.

A. It is always natural for cattle to follow the creeks.

Q. Now, coming along this fence up Toejam Creek to a point marked "Opening No. A," state whether or not that would be a natural pass for cattle to enter going in toward the Toejam Mountain?

A. Yes, sir, that is where we drift cattle.

(Testimony of George Russell, Jr.)

Q. And how long has that been the custom?

A. Well, ever since I have been in that country, since 1896.

Q. Now do you know North's or Noble's fence up here? A. Yes.

Q. How long have you known it?

A. Since 1896.

Q. What can you say as to the condition of that fence during the last three years?

A. As I remember the fence, it was a three-wire fence, and I was there three years ago, and it seemed to be in fairly good condition. Last June when I was there the fence was down.

Q. Last June? A. Yes, sir.

Q. Do you know how long it had been down at that time, can you tell? A. No, sir, I could not tell.

Q. What was the condition of the wires?

A. Well, the wires in places were lying on the ground, and the posts broken off; and other places the staples would be out, same as if it were not kept up.

Q. Seem as though they had been pulled out, or gradually worked out from disuse?

A. I should judge they had worked out from disuse.

Q. Were you there in May of last year?

A. No, sir, I don't believe I was, I was there in June.

Q. Now this country here, from this so-called Opening A, running [316] up to the northeasterly through this long snakey looking thing called Toejam

(Testimony of George Russell, Jr.)

Mountain, and to the east of that 2½ miles, are you familiar with that territory? A. Yes, sir, I am.

Q. What can you say as to the character of that territory, with reference to its passability for stock?

Same objection, ruling and exception.

Mr. PLATT.—That is not testifying to the facts, but giving his opinion.

Mr. DENMAN.—I want the facts with reference to the condition of the country with reference to the passability of stock.

A. Well, it is a large mountain on the south and east side, and there are trails going over the side of the mountain down into the creek.

Q. What can you say as to the character of the feed in there?

A. Well, there is generally very good feed in there.

Q. Is it a natural passageway for cattle?

A. Yes.

Q. How long has it been there?

A. I don't know how long.

Q. Well, as long as you can recollect the cattle have gone through there? A. Yes, sir.

Q. How wide a territory is there between Opening No. A, and North's fence through which cattle can pass northeast?

A. I don't know exactly where Opening No. A would be there, because I never saw a map of that country; that is, I was never there with a surveyor.

Q. Do you know where that clump of trees is?

A. Yes.

Q. You know where Noble's fence is? A. Yes.

(Testimony of George Russell, Jr.)

Q. Do you know where the end of the Golconda Cattle Company's fence is? A. Yes.

Q. Well, that is Opening A.

Mr. LEWERS.—You will admit, will you, that that opening is [317] by that clump of cottonwoods?

Mr. PLATT.—I don't know.

Mr. DENMAN.—(Q.) Now, let me ask you: do you know where the quaking asps and the spring is, westerly of Opening A? A. Yes.

Q. And you know that gap between the Golconda Cattle Company's fence and Nelson's fence?

A. Yes.

Q. Is that the opening you testified to as being a natural pass for cattle going through there?

A. Yes, sir, cattle would go up that way.

Mr. PLATT.—That is not the opening to which he testified. Counsel directed his attention to Gap No. 6, I think it was, down here.

The COURT.—Well, more recently he understood he was talking about this Opening A, at the end of the Golconda fence.

Mr. PLATT.—He is now; but the witness did not testify as to that being a natural place for cattle; he was not asked that question about this gap.

The COURT.—He told about this point down below being a natural gathering place, as I recollect.

Mr. DENMAN.—I have a keen recollection I asked him also about this gap here, and he testified that was a natural place where cattle would naturally pass coming from the south of Nelson's fence, and

(Testimony of George Russell, Jr.)

working to the north.

The COURT.—Perhaps that was testified when he was standing by the blackboard. The testimony that they give there at the blackboard I can hear but very little of it; and if you want me to hear it, it will be necessary for you to instruct your witness to speak louder, or else have the witness take the stand.

Mr. DENMAN.—I am very anxious, your Honor, it should be heard.

Q. I will ask you again whether or not that opening which appears on the map with the Golconda Cattle Company's fence on the [318] west and Nelson's fence on the east, is a natural opening and passageway for cattle moving up from the south towards the Toejam Mountain?

A. Yes, sir, cattle can go through that way.

Q. When you say cattle can go through that way, would that be the natural way for them to go, striking this fence, and going north?

Mr. PLATT.—Object on the ground it is a leading question; on the second ground the question has been answered before, and on the third ground it is calling for the conclusion of the witness.

The COURT.—Well, the objection will be sustained on the ground it is leading.

Mr. DENMAN.—(Q.) Well, what can you say as to that pass in through there, with reference to its being a natural or not a natural pass for cattle?

Mr. PLATT.—The question has been asked and answered, if the Court please.

Mr. DENMAN.—I don't think it has, in definite form.

(Testimony of George Russell, Jr.)

Mr. PLATT.—He said cattle would go through there.

Mr. DENMAN.—I ask now whether it is a natural pass for cattle to go through there, between the fences running up from the east and south.

The COURT.—If the only objection is it has been answered before or twice before, I will let it be answered again. It seems to me it would be better if he would give the facts, so we can tell whether it is a natural pass or not.

Mr. DENMAN.—(Q.) Let me ask you, does the Nelson fence extend as indicated on this map, from a point about several miles to the easterly, and lead up towards this Opening No. 1? A. Yes.

Mr. PLATT.—I don't want to keep on objecting to leading questions. [319]

Mr. DENMAN.—It is on your own exhibit.

Mr. PLATT.—It does not make any difference. This is his own witness, if the Court please; and he says does that Nelson fence extend thus and so; he is putting the words in the mouth of the witness.

Mr. DENMAN.—The question is leading, undoubtedly, but it is with reference to an exhibit in evidence; it is their claim as to the location of the fence, and I am simply following the claim, getting a picture in the mind of the witness, as they claim it is.

Q. Tell what direction from Opening No. A, if you know, the Nelson fence extends.

A. It runs east, if I remember.

Q. About how far?

(Testimony of George Russell, Jr.)

A. Oh, it runs east quite a long ways, 5 or 6 miles.

Q. What direction, would cattle coming from the south drifting north, strike that fence?

A. Which fence?

Q. Nelson's fence.

A. Well, that would be a very hard question to answer; they might be either way, might go east or might go west.

Q. If they went west where would they arrive on this map? A. Well, they would go—

Mr. PLATT.—I think that is so problematical, if the Court please—

The COURT.—I will allow that question.

Plaintiff excepts.

A. They would go in this opening here; it is not a pass, it is an opening, there is a mountain there, or hill.

Q. What is the character of the land between the two fences, the gap, as to being smooth?

A. Well, there is a low mountain in there, or hill.

Q. I am talking about the 300 feet between the two fences. [320]

A. Yes, sir. I don't remember just exactly how far this Golconda fence ran up, whether it ran on the hill or not, but I know along this pass there, between Nelson's fence and the creek this is a low mountain in there, or a ridge.

Q. Would cattle drifting along this fence to the westerly, go past through there, and through that gap, going up into Toejam country? A. Yes, sir.

Q. You see marked on the map "Opening No. 5"?

(Testimony of George Russell, Jr.)

A. Yes, sir.

Q. Marked with an arrow with two points on it?

A. Yes, sir.

Q. And from there easterly for 2½ miles did I understand you to testify that was a good cattle country in there? A. Yes, sir.

Q. And that the cattle could get through freely for 2 miles and a half to the easterly?

Mr. PLATT.—He did not so testify.

Mr. DENMAN.—I think he did.

Mr. LEWERS.—Ask him what is the fact.

Mr. DENMAN.—(Q.) What is the fact with regard to the condition of the country for the passage of cattle to the easterly through that territory?

A. There are trails going up through there, and it is over a long ridge.

The COURT.—I did not understand the last of that answer.

A. I say there are trails going up through there over a long ridge; the creek is north of there, and there is a bald mountain, as we term it there, where cattle or stock pass over these trails going into Toejam Creek.

Q. Is there any brush, obstruction of that kind there to hold cattle back? A. No, sir.

Mr. PLATT.—Same objection. I didn't have time to interpose it, and I move the answer be stricken out. [321]

Mr. DENMAN.—(Q.) Any feed there?

The COURT.—It seems to me you don't try to avoid direct questions as much as you might. It

(Testimony of George Russell, Jr.)

leads to objections, and it is not pleasant. If you will avoid them as much as possible, I think it will expedite matters.

Mr. DENMAN.—(Q.) What is the character of the vegetation in there—oh, pardon me, is there any vegetation in there? A. Yes.

Q. What is the character of the vegetation in there? A. Bunch grass.

Q. What can you say as to its thickness?

A. A good year it is very thick, and is considered a good feed country.

Q. Anything else in the way of feed besides bunch grass?

A. I believe that is all I ever noticed there; might be different kinds of grass, it is termed bunch grass.

Mr. DENMAN.—Take the witness.

Cross-examination.

Mr. PLATT.—(Q.) Do you know whether that is private land or not, up in that Toejam country?

A. Why, some of it is owned by individuals, and there is some Government land in there I believe, if I remember the map.

Mr. DENMAN.—(Q.) Do you know of your own knowledge anything about it?

A. Yes, sir, we have maps in our office of a portion of that country.

Q. Do you know of your own knowledge anything about the actual ownership, yourself?

A. I know some of it, yes, sir.

Mr. PLATT.—(Q.) State whether or not that land indicated on the plat in the blue right next to

(Testimony of George Russell, Jr.)

that thing, as Mr. Denman [322] calls it, looking like an angleworm or snake, up in the northeast corner, is private land or not?

A. Well, I could not tell from that map.

Q. You don't know then of your own knowledge?

A. No, sir.

Q. Do you know the character of the land, as to whether it is private or public land, on the other side of Toejam Mountain?

A. Which side do you call the other side?

Q. The northeast side.

A. No, sir, I never saw the map of that country.

Q. Ever been over there? A. Yes, sir.

Q. What is the condition of the country on the other side?

A. Very good country over there; good feed country, lots of bunch grass and shade.

Q. Is it fenced in at all?

A. No, sir, I don't believe it is.

Q. Do you know whether it is or not?

A. I could not swear whether it is or not; it was not the last time I was there.

Q. When were you there?

A. Well, I have not been over there in several years, down through the creek there, but out by what we call Falcon, a mining camp over there, an old deserted mining camp.

Q. About how long ago was that you were there?

A. I should judge six years ago.

Q. Is it pretty steep coming from that direction into what is represented as the inclosure there?

(Testimony of George Russell, Jr.)

A. Why, the hills are more rolling after you get up to this mining camp. I could state there is an old road comes down from this mining camp onto the creek, that is from the north side, and evidently been used at one time to haul wood; there is lots of cord-wood piled up, or was at the time I was there, on this creek, to be hauled to Tuscarora, and after you cross the creek on the south side are these [323] stock trails I speak of, coming up over the mountain between those two fences.

Q. Is it pretty steep to get up there to that point represented in the blue upon the plat?

A. No, sir, I would not call it very steep. These trails come up gradually, you know, on a small grade, ascending grade, like all stock trails are.

Q. You don't know whether there are any fences back there or not?

Mr. DENMAN.—Object to that question as incompetent, irrelevant and immaterial. The Government has not claimed in any portion of the pleadings that there are fences there.

Mr. PLATT.—I understand counsel have endeavored to enlarge the scope of that map by putting some additional territory without the inclosure.

The COURT.—I will allow the question.

A. As I stated before, when I was there about six years ago, there were no fences.

Mr. PLATT.—(Q.) Not six years ago?

A. Yes, sir. Do I understand you correctly, north of Toejam around Falcon; is that where you have reference to, that mining camp?

(Testimony of George Russell, Jr.)

Q. I think so; I mean that land in this direction, that is, in a northeasterly direction.

A. No, sir, there were no fences there at that time.

Q. Not six years ago? A. No, sir.

Q. Now you say at Opening No. 6 in the fence, and Opening No. A in the fence, that it would be a natural place for cattle to go through; is that true?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said Opening No. A cattle do go through there.

Q. You said cattle do go through there?

A. Or can go through there.

Q. Then you don't mean to be understood it is a natural place [324] for cattle to go through?

A. Well, under the conditions now it is.

Q. Why under the conditions now is it natural?

A. Because prior to the time Mr. Nelson had his fence there, they would go over that country, it is a level country, and keep further to the right than they do now.

Q. Prior to whose putting up the fence there?

A. Mr. Nelson's putting up the fence there.

Mr. DENMAN.—(Q.) The fence throws them to the west then? A. Yes, east or west.

Q. Towards the Government territory?

A. Yes.

Mr. PLATT.—(Q.) Is it natural for them to go through there now?

A. I suppose it is, or has to be.

Q. Well, it is just natural, is it not, because there is a gap in the fence, and there is not any other place

(Testimony of George Russell, Jr.)

for them to go through; is not that what you mean? In other words, they cannot jump the fence, or go under it, so they go through a gap in it.

A. Yes, sir, that is the way they have to go.

Q. That is practically what you mean, is it not?

A. Yes.

Q. How about Opening No. 6 down here?

A. That is a natural opening.

Q. That is a natural place? A. Yes.

Q. Anybody congregating a lot of cattle in the southeast corner of this plat, or outside of this so-called inclosure, and wanted to drive them along the creek, going north, it would be a natural place for them to collect them down here, would it not? That is what you mean, is it not?

A. No, I don't mean exactly that. You understand it is the instinct of cattle and stock in the summer-time to work north to the bottom ranges, and cattle coming through these passes I speak of, Hot Creek pass and Willow Creek, naturally would strike the creek in that vicinity, and it would [325] discommode them very much making them travel very far.

Q. These cattle coming up along Willow Creek at the southwest corner of the plat, would go along the creek, and collect at Opening No. 6; is that what you mean? A. Yes.

Q. And it would be a natural place for them to go up? A. Yes, sir, a very good place.

Q. Now, suppose there were lots of openings made in the fence all along here, down the southern por-

(Testimony of George Russell, Jr.)

tion of the fence, can you tell the Court whether there would be any other natural places for the cattle to go up in along the bed of Willow Creek, or if necessary, or if they desired to graze upon the Government land further north?

A. It would be impossible for them to cross the creek, or the old bed of the creek, much farther west than this natural passage now, on account of the Willow Creek dam or lake there; it backs water up quite a distance now, I notice, and that would keep them from crossing much farther west than that opening in the fence at the present time.

Q. Than the opening in the fence? A. Yes, sir.

Q. That is cattle that work themselves along Willow Creek? A. Yes, sir.

Q. Now, suppose there were cattle that came from the west or northwest, in your experience as a cattleman, would it be the logical thing for those cattle to go clear around this inclosure up to Opening No. 6, before they sought to go north? A. No, sir.

Q. It would not, would it?

Mr. DENMAN.—I object to the question on the ground it is not shown any cattle ever worked across from the west onto Government territory. The testimony all is the cattle worked up the creeks into the Government country.

The COURT.—You may ask the question. [326]

Mr. PLATT.—(Q.) You say it would not be natural for cattle to work clear around the inclosure, and go through Opening No. 6? A. No, sir.

Q. As a matter of fact, the natural thing would be

(Testimony of George Russell, Jr.)

for them to go through such openings as are in the west fence, would it not? A. From that side.

Q. And in going through those openings, if they were going in the Toejam Mountain country to the easterly side of this inclosure they would logically go, wouldn't they, across some of the Government land?

A. Yes, cows generally take the shortest cut.

Q. You say a cow usually takes the shortest cut?

A. Yes.

Q. Is that true of cattle? A. Yes.

Q. That is true of all cattle, is it not? A. Yes.

Q. In other words, if they went up against a fence and found a gap in it, they would go through it, wouldn't they? A. Yes.

Q. Now, in your experience as a cattleman, suppose you were driving a thousand head of stock from the west going east, and there were openings all along the west side of this inclosure, would you drive your cattle clear around the inclosure until you found this opening, or would you go right straight through there?

A. Well, I would endeavor to go straight through.

Q. And more particularly, wouldn't you, if you were driving your cattle across land which was suitable for grazing?

A. Well, that would depend on conditions.

Q. It would depend on conditions. And it follows, does it not, as a cattleman I take it you will agree with me, if all the west side of the fence was closed up, and you could not go through, naturally you

(Testimony of George Russell, Jr.)

would have to go around where you could get through, wouldn't you? A. Certainly.

Q. Now how about driving cattle from the north, and going south. Suppose as a cattleman, you were driving cattle from the north, [327] going south, and no openings in the northern part of the fence?

A. Well, I can illustrate that to you by my experience, when we rodeoed north we used to drive our cattle back on the range, and drive them around Rock Creek field, drive them around the Noble field; I am speaking of from the north side.

Q. Where would you collect the cattle from the north side to drive them around the Noble field?

A. We used to collect them right below the field on Toejam Creek.

Q. Suppose you wanted to graze your cattle, not on private land belonging to somebody else, but suppose you wanted to use the privilege of grazing them on the Government land within this inclosure, if there were no openings from the north, you would have to come clear around to this opening on the south, wouldn't you? A. Yes.

Q. Now, Mr. Russell, do you know of any natural places along the north border of that fence at which you might collect your cattle, in the event there were openings in that North fence, in order that you might graze within the Government land, or on the Government land?

Mr. DENMAN.—Object to that on the ground it is not shown there was any practice or custom of the country to make such a use of that territory. What

(Testimony of George Russell, Jr.)

might be done with regard to that district, I take it is not a matter pertinent here.

Objection overruled. Defendant excepts.

A. Answer the question?

Mr. PLATT.—(Q.) Do you know of any natural place, I asked you, where cattle might be collected, and where an opening might be formed in the north side of the fence, so if you desired to graze your cattle upon the Government land inclosed here, you might collect them for that purpose, and drive them through the gap or opening?

A. I have never been on Rock Creek since that fence [328] was built.

Q. Have you been there before? A. Yes, sir.

Q. Were there any natural places to get upon the Government land from the north? A. There are.

Q. You don't know that those places have been changed, do you?

A. No, sir, I could not say anything about that. I was never up on Rock Creek since the fence was built.

Q. How long ago did you familiarize yourself with the condition existing along Rock Creek, and more particularly along the north of the plat?

A. How many years ago?

Q. Yes.

A. I was over there in 1899, the first time.

Q. At that time do you recall whether there were plenty of places at which cattle might be collected, so that they might be driven upon this Government land? A. Oh, yes.

Q. As a matter of fact, Mr. Russell, there are just

(Testimony of George Russell, Jr.)

as good places along the northern border of this field, are there not, as there are upon the southern border, or the southeast border, to collect cattle, for the purpose of driving upon this inclosure?

A. I should say there are.

Mr. DENMAN.—We concede that, Mr. Platt, there is no question about that.

Mr. LEWERS.—Will you show anybody ever drove them over there?

Mr. PLATT.—I have demonstrated that, and shown it by several witnesses, if the Court please.

Q. Do you know, as a matter of fact, whether the Golconda Cattle Company has ever driven sheep from the west upon the land or inclosure represented in the white, and lambed and grazed those sheep upon that Government land?

A. I could not say as to that, about their sheep, I never paid any attention to them.

Q. Have you ever noticed whether they have driven any cattle that way or not?

A. Yes, sir. [329]

Q. Do you know whether they have or not?

A. Why, they have in common; when I say in common, I mean with other parties, our two outfits was worked in there together, and drive the cattle as we find them.

Q. What two outfits were worked together?

A. Golconda Cattle Company and the Russell Land and Cattle Company.

Q. Is that the company of which you are a stockholder or official? A. Yes.

(Testimony of George Russell, Jr.)

Q. What is your official relation to that company?

A. I am vice-president of the company.

Q. How is it that you both worked your cattle together across that territory?

A. Well, because they mixed.

Q. Have you an understanding with the Golconda Cattle Company that you work together for that purpose? A. Yes, sir.

Q. Do you remember how often the Golconda Cattle Company and your company in common worked cattle from the west along over these lands, inclosed Government lands? A. Once a year.

Q. And for how long a time?

A. Why, a day or two, the time it takes to what we call rodeo, or work the country to get all the cattle out of the country.

Q. Over what country do you work?

A. Well, we worked not particularly with reference to that map, over all that country.

Q. Over all this country represented in the white?

A. Yes, sir.

Q. Now for how many years have you been doing that?

A. Well, I could not say just exactly how many years. The Golconda Cattle Company ran cattle in there for quite a while, that is, steer stuff, and then they afterwards bought the Squaw Valley Ranch, and turned their "C" stuff up there, and when they [330] came in possession of that land of course we worked together there; but I forget, or at least I don't know the time they bought the Squaw Valley

(Testimony of George Russell, Jr.)

Ranch or property, but it is since that time that we have worked in common there; in fact, they never ran an outfit there until that time, except in the fall of the year.

Q. Can you tell the Court, Mr. Russell, the general character of that land, the Government land inclosed? A. I can.

Q. What is the general character?

A. Why, it is rolling hills in there.

Q. But more particularly as to vegetation, what is the character of it?

A. It is generally fed out pretty close in there.

Q. What do you mean by feeding it out pretty close? A. A portion of that country is lambed.

Q. Lambed? A. Yes, sir.

Q. And is it pretty good feed for sheep?

A. I should judge it should be, I am not a sheepman, but I have not heard any complaint about it.

Q. What is the character of the vegetation, did you ever look at it? A. Bunch grass.

Q. Is it plentiful during certain seasons of the year?

A. Yes, sir, on a part of it, and some of it is kind of barren hills.

Q. How does it average up, the whole thing?

A. Well, I would call it a fair bunch grass country.

Q. A fair bunch grass country? A. Yes.

Q. And do I understand you to say even after sheep had been driven over it or lambed there, that your company and the Golconda Cattle Company

(Testimony of George Russell, Jr.)

had grazed cattle upon it?

A. Well, these cattle went in *their* of their own accord, and we drove them away from there, because the feed wasn't good, to get them higher up.

[331]

Q. And you drove them to other portions of the Government land?

A. Yes, sir, drove them through this opening there.

Q. While driving them, were they grazing upon the Government land? A. Oh, yes.

Q. And was there sufficient for them to eat?

A. Yes, sir, I think there was a little feed there, they got along.

Q. This is after the sheep had devastated the country? A. Yes.

Q. Do you know whose sheep they were?

A. Nelson's sheep I have seen in there.

Q. Did you ever see any Golconda Cattle Company sheep? A. Not that I remember.

Q. Were Mr. Nelson's sheep grazing upon this land within the inclosure? A. Yes, sir.

Q. On the Government land? A. Yes, sir.

Mr. PLATT.—I think that is all, if the Court please.

Mr. DENMAN.—I do not think there is anything further.

The COURT.—(Q.) Mr. Russell, I wish you would tell me something more about that range of hills or mountains on the south side of Willow Creek ridge, from the junction of Willow and Rock Creeks, toward the northeast.

(Testimony of George Russell, Jr.)

A. That is a large mountain in there.

Q. Will it turn cattle?

A. Yes, sir, it turns cattle. There is a creek south of this mountain, and south of the mountain at the head of the creek, there is another high mountain or peak, forming a natural pass that stock will follow this creek up to the head, and go out through the pass, and come down on Willow Creek.

Q. Is that pass on the map?

A. No, sir, I don't believe it is shown there.

Q. Is it below the junction of Willow and Rock Creek? [332]

A. No, sir, it is about opposite the Squaw Valley dam.

Mr. LEWERS.—(Q.) You mean the Willow Creek dam?

A. Yes, the Willow Creek dam, and Squaw Valley.

The COURT.—(Q.) About how far is it from the junction of the two creeks?

A. Willow and Rock Creek?

Q. Yes.

A. I should judge it would be 7 or 8 miles up there.

Q. Is it above or below that dam?

A. Well, this long mountain extends from Butte Creek, possibly a mile above the junction, Butte Creek comes in and forms a pass, and Butte Creek intercepts Willow Creek about a mile above the junction.

Q. Give that again.

A. Butte Creek intercepts Willow Creek about a mile above the junction, I should judge, of Rock

(Testimony of George Russell, Jr.)

Creek and Willow Creek, and then it would be north and east of Butte Creek, this large mountain extends for about 5 or 6 miles, and terminates opposite Willow Creek dam; that is, the mountain forms part of Willow Creek Canyon from the north side, and slopes down into Willow Creek, the canyon does.

Q. Is there a pass at Butte Creek through which cattle can go? A. Into Willow Creek, you mean?

Q. Yes.

A. Yes, sir, there is; it follows Butte Creek up to the head, and then there is a large mountain between this mountain I speak of, I don't know the name of it, and cattle go out through this pass; it forms a natural pass, a low pass through there, and come down over what we call Alkali, on Hot Creek, and strike Willow Creek about this opening in the fence there.

Mr. PLATT.—May I ask just one question. Does that mountain about which you testified, and which you say has a pass in it available for cattle, is that mountain within or without the fence line as shown upon the plat? A. Without.

Q. It is without? A. Yes, sir. [333]

Mr. DENMAN.—(Q.) The mountain, then, is between the cattle coming from the south, and this south fence line? A. Yes.

Q. And that is what turns them up towards this Opening No. 6, and the territory easterly of the reservoir? A. Yes, sir.

Mr. DENMAN.—That is all.

(Court adjourns until Saturday, March 9th, 1912, at 10 o'clock A. M.) [334]

Saturday, March 9th, 1912, 10 A. M.

[**Testimony of J. Sheehan, for the Defendant.**]

J. SHEEHAN, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. What is your full name, Mr. Sheehan?

A. J. Sheehan.

Q. You live in Winnemucca, Nevada, do you not?

A. I do.

Q. And you are cashier of The First National Bank at that place? A. I am, yes, sir.

Q. How long have you held that position?

A. About 6 or 7 years.

Q. State whether or not you have ever had any experience in the cattle business, or any connection with it. A. I have.

Q. When and where?

A. Well, principally in Elko County some years ago.

Q. About how many years ago, approximately?

A. Probably 20 years ago.

Q. What was the nature of that experience,—in general, I mean?

A. Working on ranches, on different ranches in Elko County.

Q. Are you familiar, or have you ever seen any portion of the Squaw Valley Ranch of the Golconda Cattle Company? A. I have.

Q. When were you there, as near as you can fix

(Testimony of J. Sheehan.)

the time? A. About ten days ago.

Q. And in whose company did you go there?

A. Mr. Button, F. J. Button, Mr. S. G. Lamb, Mr. Petrie, and Mr. Lewers, yourself.

Q. And was not Mr. Tilden also present?

A. Mr. Tilden, yes, sir, the surveyor was present.

Q. How did you go to the Squaw Valley Ranch on that occasion? [335]

A. We went to the ranch in an automobile, and from the ranch to a little above the reservoir in an automobile; we then took saddle-horses and went over the range.

Q. Did you go up to the reservoir on the first day that you were there? A. No, sir, the second day.

Q. Will you step down and examine this plat, so that you may understand it. The line on the north side represents Rock Creek; the line on the south side represents Willow Creek, and this portion here represents the reservoir to which you have testified; and this line here indicating a stream, represents what is known as Siawappe? A. Yes, sir.

Q. And this portion up in there, that line that I follow with the pointer, represents what is called on this map North's fence, and sometimes referred to as Noble's fence. Are you able from that description to locate any of the portion of the territory shown on this plat, from your recollection?

A. I am, yes, sir.

Q. I call your attention to a point marked "Opening No. 1," with a dotted line following that, purporting to represent what is known as the Midas-

(Testimony of J. Sheehan.)

Tuscarora road; were you down at point No. 1?

A. I was.

Q. On which day were you at point No. 1, the first or second day? A. The first day.

Q. Will you describe what you found at point No. 1?

A. We found what is known as a lane, or an opening at that point.

Q. And state whether or not the road known as the Midas-Tuscarora road ran anywhere in the vicinity of that lane.

A. It passed right through it.

Q. Now, I understand you to say that on the next day you went to a certain point in the automobile; where, as near as you can fix [336] it from your recollection, was it that you went in the automobile?

A. About 2 miles above the reservoir.

Q. You are referring to the Willow Creek Reservoir?

A. Yes, sir, to a point at about the end of the fence, where the fence ends.

Q. Will you describe what you saw there with reference to the fence and to the surrounding country?

A. Well, the surrounding country, I suppose stockmen would call it a draw; that is, it was an open canyon with other little canyons leading into it coming in there; and at that point we took our saddle-horses.

Q. What did you there observe, if anything, with reference to fences?

(Testimony of J. Sheehan.)

A. Well, that was the end of the fence running in that direction, it was then open to a fence running in the opposite direction.

Q. You mean in the opposite direction, or at right angles? A. Well, possible at right angles.

Q. At right angles? A. Yes.

Q. You say at that point you went on horseback?

A. Yes, sir.

Q. Where did you go on horseback? Just a moment, I withdraw that question. When you speak of the end of the fence, will you step down and examine this plat, and point out where that was on the plat, this being the reservoir, and the red line purporting to represent the fence.

A. That would be about here (indicates).

Q. Indicating Opening No. 6. Is that the place that you have stated was a draw with a number of canyons leading into it? A. Yes, sir.

Q. Now will you describe generally at first where you rode on horseback?

A. We followed along the fence leading towards what would be indicated on that map as the North's fence, off in [337] that direction; that is, it is north, I believe.

Q. That is, you followed that general direction up to you say what is indicated on this plat as North's fence? A. Yes, sir, I think that would be it.

Q. State whether or not on that trip on horseback you found any trees. A. We did.

Q. And will you state where those trees were with reference to any fence that you may have found?

(Testimony of J. Sheehan.)

A. We found a clump of trees at a spring, and I believe it is right at the end, about the end of the fence known as the Squaw Valley fence, and about beginning at a fence known as the Nelson fence.

Q. Do you remember the kind of posts that were in the Nelson fence?

A. Just the native posts of the valley there, cottonwoods, I should say.

Q. Cottonwoods? A. Yes, sir.

Q. What if anything, was there in the way of an opening at the point where you found these trees?

A. There was an opening there.

Q. What kind of an opening?

A. There was no fence, there was just posts, and the wire was down, that is, there was none there, I could not see any, I did not.

Q. Will you again step down and examine the map for a moment. I call your attention to the red line coming down there which has been denominated as Nelson's fence.

The COURT.—The red line Nelson's fence?

Mr. LEWERS.—This red line here, as I understand it, has been testified to as Nelson's fence.

Mr. PLATT.—I don't think so, if you will pardon me. If the Court please, the map shows that Nelson's fence is marked plainly Nelson's fence, underneath it a black line. The red line is a line testified to as having been constructed by the Golconda [338] Cattle Company as a part of their line fences.

Mr. DENMAN.—Is it your contention that this red line above opening No. A is built by us?

(Testimony of J. Sheehan.)

Mr. PLATT.—Yes.

Mr. DENMAN.—Then we will have to go over the fence; we misunderstood it; that is Nelson's fence.

Mr. PLATT.—The legend describes that.

Mr. DENMAN.—It does not say by whom.

Mr. PLATT.—The only part upon the plat marked Nelson's fence is the black, and all the testimony was to that effect. It is immaterial, if the Court please, just so we know the facts.

Mr. LEWERS.—You may recollect, I think this will bring the testimony back to your mind, Mr. Platt, and that of the Court, that Mr. Osborne testified with reference to that red fence running up there, and stated it was not any part of the fence that had been built by him, and that it was known as Nelson's fence; and the plat shows that it is connected, and is a continuation, apparently making a field, with the fence marked in black, "Nelson's fence."

Mr. PLATT.—Well, whatever the facts show, if the Court please, it does not disturb our theory of the case.

Mr. LEWERS.—I think we might stipulate as to that point; there is no question but what that is our fence.

Mr. PLATT.—If Mr. Flocker testifies, or the record shows it, that will be conclusive.

Mr. DENMAN.—What does Mr. Flocker say?

Mr. PLATT.—Mr. Flocker, I wish you would examine that portion indicated in the red along where Nelson's fence is indicated, just above the black line, and state whether or not you testified that was a

(Testimony of J. Sheehan.)

fence constructed by the Golconda Cattle Company, or by Nelson. [339]

Mr. FLOCKER.—I testified that Mr. Petrie told me, and you would not let it go in the record, that Thomas Nelson had built it.

Mr. LEWERS.—You did not understand, Mr. Flocker, that that was built by the Golconda Cattle Company, did you?

A. I did not. The remarks on the side show that.

Mr. DENMAN.—And that is the fence which begins at the north end of Opening No. A, and runs in a general north by east direction, and thence easterly, into Toejam Mountain? A. Yes.

Mr. PLATT.—In other words, it is a continuation of the black Nelson fence?

A. It is a newly constructed and changed position of Nelson's fence.

Mr. DENMAN.—That was not there in April, when you went in last year?

A. No, sir.

The COURT.—Does that fence take the place of any fence previously erected by Nelson, Mr. Flocker?

Mr. PLATT.—No, your Honor.

Mr. FLOCKER.—It does not take the place of a fence built by Mr. Nelson, but it is an extension of one that was already there, and a slightly changed position, and extended quite a considerable distance north of east.

The COURT.—It is an extension of a fence which was already there?

A. Yes, sir.

(Testimony of J. Sheehan.)

Q. The previous fences had not been moved then?

A. No, sir.

MR. DENMAN.—(Q.) Now, Mr. Flocker, this black line you have on here represents what the fence formerly was?

A. Yes.

Q. This black line here represents the old fence as it stood?

A. The black line represents the old fence as it stood at the time of my first investigation, and the natural barrier was shown, going from the end of Nelson's fence, old fence, around this way to North's fence; and at the time of my investigation in July, Nelson's fence line had been changed, and placed in this position, [340] and extended up here and into the mountain.

Q. Where is that first map, Mr. Flocker, or where is the first one you drew?

A. I guess it is in the office in San Francisco.

Q. Is it not up here, as a matter of fact?

A. I don't know whether Mr. Platt has a copy of it or not.

MR. PLATT.—I can look and see.

MR. DENMAN.—You remember you showed it to me, Mr. Platt in one of conferences. I would like you to produce that map.

MR. LEWERS.—Just one more question, Mr. Flocker, to have the record clear. As exhibit No. 1 now shows, there is apparently a black line fence extending beyond the point where the red fence cuts into it, is that the fact?

(Testimony of J. Sheehan.)

A. I don't believe it is a fact; I didn't go over it to see whether they took down the old fence or not; in July, 1911, we didn't go over to see whether he had taken down the old fencing, when the fence was changed to the new position.

Q. And I will ask you one other question in that connection: Does this north line of the Nelson fence run due east and west, or does it cut toward the south-east?

A. To the best of my knowledge, it runs due east and west.

Q. Do you remember taking a course on that?

A. I don't believe I did.

Q. Did you follow that out to see whether they had completed any field? A. No, sir.

Q. So that this end of the fence indicated on your plat does not necessarily indicate that the fence does end there? A. No, sir.

Mr. LEWERS.—That is all. [341]

Mr. LEWERS.—(Q.) Now, Mr. Sheehan, I was asking about the territory in the vicinity of that clump of trees; when you speak of an opening I will ask you whether that opening is the one which is here indicated as opening No. A, at the point I am showing you? A. It is, that is the opening.

Q. Will you describe the character of the ground in that opening and on the sides of it; I mean with reference to whether it was rocky, hilly, smooth, or what it was? A. Right at the opening?

Q. Yes.

A. Why, it was smooth, as far as I could see; there

(Testimony of J. Sheehan.)

was some snow there, just on the side of the hill; we dismounted at that point, walked around there, and tightened our saddles.

Q. Did you see any obstruction in that opening in the way of brush, rocks, trees, or anything else?

A. No, sir; we did not.

Q. State whether or not that was such an opening that cattle, or even a wagon could be drawn through.

Mr. PLATT.—Same objection, if the Court please, as we heretofore interposed, upon the ground that it calls for an opinion of the witness.

The COURT.—Same ruling and same exception.

Mr. LEWERS.—(Q.) Answer the question.

A. We went through it with saddle horses, I believe cattle could go through it.

Q. Was there any obstruction in that opening at all? A. No, sir.

Q. Now, at that point you said you dismounted, did you observe any of the country towards the east or northeast? A. We did.

Q. What did you observe?

A. Well, that it was a country of rolling hills and canyons off to the north of us, similar to the [342] surrounding country all around it.

Q. What kind of hills, will you describe them a little more fully.

A. Well, they were rolling hills until, I could see further off, gradually getting higher to almost mountains, a long ways, though, from where we were.

Q. A long ways, you say? A. Yes, sir.

Q. Now, did you see anything there in the way

(Testimony of J. Sheehan.)

of rim rock? A. Not there, no sir.

Q. Was there anything there, if there was describe it, that would obstruct the passage of cattle?

A. I saw nothing.

Mr. PLATT.—Same objection, if the Court please; and the further objection that the question is leading. I did not object to the other leading question, I thought it was preliminary. I don't think the witness ought to be led, if the Court please.

Mr. LEWERS.—I am endeavoring not to. I asked him to describe a country, and to save time I called his attention to it.

The COURT.—It will be the same ruling and the same exception. The objection that it is leading I will ignore for the present, but you must avoid leading questions just as much as possible.

Q. I shall endeavor to do so, if the Court please. Now, Mr. Sheehan, after you had reached the point indicated on the plat as "Opening No. A," where did you go?

A. We went across—I have forgotten the name of that creek; I think they called it Toejam, off in that northern direction.

Q. Well, with reference to this fence you have described as built on cottonwood posts, Nelson's fence, where did you go?

A. We followed that fence off in a northerly direction; I could indicate on the map.

Q. I wish you would do so; take this pointer and indicate so [343] that the Court may see.

A. At this point here (indicating).

(Testimony of J. Sheehan.)

Q. Indicating Opening A.

A. We went across in this direction.

Q. That is, did you follow up that Nelson fence?

A. Yes, sir, we followed up the Nelson fence along here, to a point about in here (indicates).

The COURT.—That is, he followed up the Nelson red fence?

Mr. LEWERS.—Up the Nelson red fence to a point indicating the end of the arrow to the right of the exhibit, marked “Opening No. 5.”

The COURT.—Well, that is to the south end of the opening?

Mr. DENMAN.—It is southeasterly.

Mr. LEWERS.—It would be the southeast end.

A. Yes, sir, we followed about down there.

Q. Then where did you go?

A. Then we cut across to this creek in here.

Q. What is known as Toejam Creek here?

A. Yes.

Q. I believe it is not indicated on here at all, is it?

Mr. DENMAN.—No, it is indicated on that other map. This is a map made by the surveyor who was there at the time.

Mr. LEWERS.—This map just came into the courtroom; we have not identified it yet. We will withdraw Mr. Sheehan for a moment, with the Court’s permission. Will you step out, Mr. Sheehan; and Mr. Tilden, will you take the stand?

Mr. DENMAN.—Before Mr. Tilden goes on the stand, I would like to ask one question of Mr. Flocker. [344]

[Testimony of Ira M. Flocker.]

Mr. DENMAN.—(Q.) At Opening No. 5 the words “North’s fence to Noble’s fence” appear; that is a mistake, is it not, that means North’s fence to Nelson’s fence, does it not? A. Yes, sir.

Q. Will you correct that on there with your own hand.

(Witness makes correction on map.)

Q. Now, will you identify this red line here, running from Opening No. A to the arrow, as Nelson’s fence.

Mr. PLATT.—It is so indicated by the legend, I think, on the right.

Mr. DENMAN.—The legend was stricken out. (Witness marks line as requested.)

Q. Now, put your initials under that, please, Mr. Flocker.

(Witness marks initials on plat.)

Q. That was not there in April, 1911?

A. I could not testify to that, because I was not up that far; I merely came up to a point in section 20, township 39 north, range 49 east, in order to see whether or not this original gap as originally reported at that point had been closed.

Q. At that time had not been closed?

A. Had not been closed; it was not closed at the south end; I don’t know whether or not they were working at the north end.

Q. You don’t know whether anybody was working at all, do you? A. No.

Q. You didn’t see anybody there, did you?

(Testimony of Ira M. Flocker.)

A. No, sir.

Mr. PLATT.—I would like to ask Mr. Flocker a question or two.

Q. Upon what visit that you made did you notice that this gap about which you have just been testifying was closed? A. On July 22d.

Q. That was your second visit? A. Third. [345]

Q. You noticed on your third visit that gap had been closed? A. Yes, sir.

Mr. DENMAN.—One moment. He does not mean closed. He says on the map there it was open.

Mr. PLATT.—He does say it was closed.

The COURT.—I think it would be just as well to let the witness answer without correcting him; it simply makes confusion, and distracts the attention, and if he don't answer as he should, you can cross-examine. I will never refuse that.

Mr. DENMAN.—I should have objected to the question as leading.

Mr. PLATT.—This examination, if the Court please, is based upon the direct examination of the counsel taking a witness out of order.

The COURT.—You may proceed, Mr. Platt.

Mr. PLATT.—(Q.) When I asked you the previous question, you understood that I meant, did you, the gap indicated in the black upon the plat?

A. Yes, sir.

Q. Now, state whether or not, without again expressing your understanding of it, upon what visit was that gap represented in the black closed.

(Testimony of Ira M. Flocker.)

A. July 22d, 1911.

The COURT.—I wish you would ask those questions again, Mr. Platt; my attention was distracted, and I don't understand just what the witness testified to.

Mr. PLATT.—(Q.) As I understand, Mr. Flocker, the black line upon the extreme right of the plat with the 35 or 40 little black marks extending therefrom, represents a gap in the Golconda Cattle [346] Company's fence, which you discovered when you made your first and second visit to the property?

A. Yes, sir.

Q. Now, I asked you whether that gap was closed up by a line of fence represented in the red upon the plat when you made your third visit?

A. Yes, sir.

Q. Now, did you testify upon direct examination as to who built that line of fence indicated in the red?

A. My map indicates it was built by the Golconda Cattle Company; I don't remember whether I testified to that or not.

Q. Will you state now if, in your own knowledge, that red line of fence was Golconda Cattle Company fence or not?

A. It was Golconda Cattle Company fence.

Mr. LEWERS.—Pardon me; which red line are you referring to?

Mr. PLATT.—I have not referred to but one red line all the time; it is the red line to which he testified as having closed up the original black gap.

Mr. DENMAN.—Now, will you kindly, Mr. Platt,

(Testimony of Ira M. Flocker.)

indicate by some designation the beginning and end of that line?

Mr. PLATT.—Well, if the Court please, I am going to bring this out, and I don't want anything that is not here.

Q. Now, you also testified by interruption during Mr. Sheehan's testimony, that the red line which you have since marked in lead pencil, and apparently an extension of the lower red line, was upon your third visit constructed, and that that upper red line was Nelson's fence; is that true?

A. To the best of my knowledge, it is Nelson's fence; I didn't testify to that, they would not allow it to go in the record.

Q. Well, you testified to it during the interruption of Mr. Sheehan's testimony, didn't you?

A. Yes, sir.

Q. And you state now to the best of your knowledge, that upper red line represents Nelson's fence?

A. Yes. [347]

Q. And that you discovered that upon your third visit? A. Yes, sir.

Q. Now, state whether or not upon your third visit you discovered an opening in this so-called red fence of the Golconda Cattle Company and of Nelson, which you have in fact shown upon the plat as "Opening No. A, 300 feet opening at Nelson's new fence line." A. Yes, sir.

Q. Now, you discovered that opening, didn't you?

A. Yes, sir.

Q. And upon what visit did you discover it?

(Testimony of Ira M. Flocker.)

A. My third visit.

Q. Then your plat correctly represents the facts as you found them upon your third visit?

A. Yes, sir.

Q. You have indicated upon the plat in the red, haven't you, as a legend, that this opening was at Nelson's new fence line? A. Yes, sir.

Q. Now, on the right here, Mr. Flocker, there is a characterization which you have designated in the legend as a natural barrier; what kind of a barrier was that?

A. That was exposed rock which would turn stock, the side of a round rocky knoll, and was made by the stream working against the side of the knoll, and turning south in its course.

Q. What was the elevation of that barrier, if you know?

A. The elevation would be only given approximately; I had no barometer or anything with me.

Q. Well, approximately?

A. I should say a thousand feet above the valley.

The COURT.—Excuse me, Mr. Platt; what valley do you mean?

A. I mean the general elevation of Squaw Valley.

Mr. LEWERS.—Would you indicate about what point that would be?

A. Down in the general flat. [348]

The COURT.—Mr. Platt, will you ask him a little more about the relative elevation of that as to the bottom of the stream?

Mr. PLATT.—(Q.) Now, can you testify approxi-

(Testimony of Ira M. Flocker.)

mately how high this barrier is compared with the land indicated in the blue, directly west of it?

A. Well, I should say the land in the blue directly west at a distance of a mile, would be 500 feet higher, relatively speaking.

The COURT.—(Q.) The barrier 500 feet higher?

A. The land, the barrier is down on the stream; the land between Nelson's north fence, and Nelson's fence at that point, would be 500 feet between the barrier down along the edge of the stream.

Mr. PLATT.—(Q.) Then the barrier, as I understand it, is set down about 500 feet lower than this land indicated in the blue? A. Yes.

Q. How high does the barrier rise from the level of the ground at which it commences?

A. Not very high; its highest place, I should say not over 10 or 15 feet, and probably as low as 5.

Q. State whether or not you think, or it is your opinion that this barrier would prevent cattle or horses or sheep from drifting into the so-called inclosure. A. It would at that place, yes, sir.

Q. Why do you give it as your opinion that it would?

A. Because I think the barrier is sufficient to turn stock elsewhere that they would attempt to get around it instead of going over.

Q. Why do you think they would attempt to get around it instead of going over?

A. Because it would be much easier to do it.

Q. Now, you have also marked here another delineation upon the plat, very close to the natural bar-

(Testimony of Ira M. Flocker.)

rier about which you have testified, and which you have indicated upon the legend as being very steep. I wish you would describe that. [349]

A. At that point the canyon is very narrow and rocky, and the south bank of it especially would be difficult to scale, either for people or animals.

The COURT.—(Q.) Which bank did you say?

A. The south bank.

Mr. PLATT.—(Q.) State whether or not, upon your first visit, if you remember, you discovered the end line of Nelson's fence indicated in the black, up close to the south terminal line of the barrier, about which you first testified.

A. It ran close to it, but it didn't run into it.

Q. It ran close to it, as you have indicated here?

A. Yes.

Q. Do you know approximately about how far it was from the end of that Nelson fence line to the terminal part of the barrier, just approximately?

A. Probably a couple of hundred yards.

Mr. PLATT.—I think that is all.

The COURT.—I don't understand that 200 yards.

Mr. PLATT.—It was this, if the Court please: I asked him how far it was from the end of Nelson's fence line.

The COURT.—That is the black fence to the end of the barrier?

Mr. PLATT.—To the south end of the barrier.

(By Mr. LEWERS.)

Q. You observed that portion of the plat which you have marked barrier, near Opening No. A, or near

(Testimony of Ira M. Flocker.)

Nelson's fence on your first visit in September, 1910, did you not? A. Yes, sir.

Q. Onto what portions of that that you have there made a barrier did you go on that occasion?

A. I did not go on the barrier.

Q. How close to it were you?

A. Very close to the upper end, and I could see it.

Q. The question is, how close to it were you?

A. Well, just across the stream, I don't know exactly. [350]

Q. How far in yards or feet or miles?

A. Oh, probably 500 or 600 feet from the upper end.

Q. And how far were you—

Mr. PLATT.—Did you testify you were 500 or 600 feet from the—

Mr. LEWERS.—If the Court please, I protest against interruption.

Mr. PLATT.—If the Court please, I think I am privileged to understand what the witness answered.

The COURT.—You may ask what the answer was.

Mr. PLATT.—The reason I interrupted, if the Court please, counsel said 500 or 600 feet from the upper end, and I didn't understand the witness so to state; I understood he testified it was 500 or 600 feet from the barrier.

The COURT.—You may read the answer.

(The reporter reads the answer.)

Mr. LEWERS.—The question was asked of the witness, and it simply disturbs the examination. I have entered my reason for objecting.

(Testimony of Ira M. Flocker.)

Q. How close were you on that first visit to the lower end of what you have marked as this barrier?

A. About a quarter of a mile.

Q. Then on that first visit you were not on this so-called barrier? A. No, sir.

Q. Did you go to that so-called barrier on your second visit? A. No, sir.

Q. Did you on your third visit?

A. On my third visit I came down over the rocky hill, along the Nelson fence line, to the west of it, came down to the clump of cottonwood trees, I think you call them, where the spring is.

Q. The question is, did you on your third visit go onto that which you have delineated as a barrier?

[351]

A. I did not, I can't—

Q. Well, you have answered the question.

Mr. PLATT.—Well, I think he has a right to explain it, if the Court please.

The COURT.—Well, proceed.

Mr. LEWERS.—(Q.) Mr. Flocker, did you on your first visit go to the portion of the plat that you have marked as a very steep bank, as Siawappe Creek? A. Yes, sir.

Q. To which portion of it did you go?

A. Passing down a ravine from the north toward it, climbed up over the side, turned toward the end, so I could observe the natural barrier along the stream on the other side.

Q. Toward which end, east or west end?

A. The west end.

(Testimony of Ira M. Flocker.)

Q. And were you at any time at the east end of what you have marked on there as the steep bank of that creek?

A. No, sir, not as far as I have shown it.

Q. How steep is that bank?

A. Well, that bank is pretty steep.

Q. In degrees, would you say?

A. Well, I should say it is approximately 45 degrees.

Q. Are there any breaks in the bank where it is less than 45 degrees?

A. Well, not of any consequence.

Q. Well, are there any?

A. There might be a few breaks to it, a few feet drop off steeper.

Q. Do you know whether there are any or not?

A. That was the general character of that bank.

Q. Answer my question. Do you know, in fact, whether or not there were any breaks in that bank?

A. I know what was there at the place I crossed it, that is all.

Q. I still want to know whether you do know, in fact, whether [352] you made a sufficient examination of the entire length of that which you have marked on the plat as bank, to answer whether or not there were any breaks or openings down to the creek through that bank?

A. No, sir, I didn't examine it minutely.

Q. I understood you to testify, I may be in error, on your original examination, that you were no closer than about a mile from what you have marked as the

(Testimony of Ira M. Flocker.)

barrier Toejam Mountain? A. Yes, sir.

Q. Were you ever any closer than that?

A. No, sir.

Q. And do I understand you to testify that this plat is a correct indication of the location of that barrier?

A. Approximately, the methods I used.

Q. That is, does it run in a northwest and southeast direction? A. Yes, sir.

Q. And what is the character of that barrier, what makes it?

Mr. PLATT.—Well, we have gone over that once, if the Court please.

The COURT.—I know we have, but I am interested in this.

Mr. PLATT.—Then I have no objection, if the Court please.

WITNESS.—That is, as I testified before, a rock outcrop.

Mr. LEWERS.—(Q.) Is it rim rock?

A. Yes, sir, looks like rim rock from a distance where I observed it.

Q. Did you from the position where you observed that, a mile down toward the southeast, observe the character of the ground at the north end of what you have marked as a barrier? A. Yes, sir.

Q. What was it? A. It was a smooth slope.

Q. With grass there?

A. I could not see any grass from the distance.

Q. And did you from the point where you were, a mile down, observe what was at the south end of what you have marked as Toejam [353] Mountain bar-

(Testimony of Ira M. Flocker.)

rier? A. Yes, sir.

Q. How could you see it over the hills?

A. There was no hill there.

Q. Do you mean that between the point a mile down of that barrier, there was no hill at all that obscured your view?

A. You are pointing to the wrong point on the map.

Q. I am referring to the south end of the barrier, and wherever you were, down in this country a mile away.

A. From my point of observation which was about the corner of the change in new position of Nelson's fence, that is that arrow point—

Q. Where I have my pointer?

A. Yes, sir, the barrier seemed to run in a southeasterly direction around the side of the mountain, down close to the stream. I have not shown it adjoining the stream, because I was not around there to see whether it did or not.

Q. Why was it that you didn't go over there and examine the barrier itself?

A. Because of lack of time that day, and for the further reason that I was hunting fences.

Q. And on your second visit, in April, 1911, why is it that you did not go up there to examine that so-called barrier?

A. Because on my April visit, I had instructions to see whether or not the original gaps reported by me were closed.

Q. Did you on your July visit go over there to examine what you have called a barrier? A. No, sir.

(Testimony of Ira M. Flocker.)

Q. Why not?

A. Because at the time of my July visit, I was simply accompanying agent Melrose on his examination, and I considered his examination as taking precedence over mine.

Q. Were you not going over the ground for the purpose of directing and showing Mr. Melrose what you had observed before? A. Yes, sir. [354]

Mr. PLATT.—I object, if the Court please, upon the ground—I don't know whether this is direct examination, or what it is.

Mr. LEWERS.—It is cross-examination.

Mr. PLATT.—And if it is cross-examination it certainly is improper cross-examination based upon my direct, because I did not ask him about any barrier, except the ones directly to the east of the blue land in the northeast corner.

The COURT.—I think that is so, but of course whatever you can draw out with reference to the exact conditions there, I would like to have.

Mr. LEWERS.—That was my idea.

The COURT.—But as to other matters, and the contradiction between this testimony and other testimony, I am not particularly anxious about that.

Mr. LEWERS.—I am not either; I am simply desirous of getting at what the witness did.

(The reporter reads the last question and answer.)

Mr. PLATT.—Object on the ground that the purport of his visits are incompetent, irrelevant and immaterial, what his purposes were, because they may not have been carried out, and any purpose not car-

(Testimony of Ira M. Flocker.)

ried out could not be testimony.

The COURT.—I will allow that answer to stand.

Plaintiff excepts.

Mr. LEWERS.—(Q.) Then did you on that third visit with Mr. Melrose go approximately upon the same ground that you had gone yourself on your first visit? A. Yes, sir.

Q. That is what I am trying to get at.

A. Not entirely.

Q. Well, where did you go in with Mr. Melrose on that third visit?

A. We went to the fence line, or the corner of Nelson's fence, new fence line.

Q. Which corner, the one marked by the arrow?
[355]

A. Yes, sir, and then we came in a southwesterly direction and followed along the fence line, Mr. Melrose and I walking, while Mr. Petrie in order to get through with his rig, had to drive around the rock point to the west, to get down.

Q. Then Mr. Petrie was up in there with a wagon?

A. Just up at that point.

Q. Then on that visit with Mr. Melrose you didn't go further north, as I understand it, than this arrow at the east end of the Opening No. 5? A. No, sir.

Q. Did you at that time, together with Mr. Melrose, or with anyone in company with Mr. Melrose, make any observation or examination of this so-called barrier, Toejam Mountain barrier?

A. I merely called Mr. Melrose's attention to the natural barrier as I had it indicated on my map at that point.

(Testimony of Ira M. Flocker.)

Q. Did you call his attention to the natural barrier as it was indicated on the ground? A. Yes, sir.

Q. And there was some discussion on that occasion, without stating what it was, with reference to that so-called barrier, was there not?

Mr. PLATT.—I object on the ground it is incompetent, irrelevant and immaterial.

The COURT.—It is not cross-examination.

Mr. LEWERS.—Has your Honor ruled?

The COURT.—Yes, I will sustain the objection.

Mr. LEWERS.—We desire an exception.

The COURT.—Very well, note the exception.

Mr. LEWERS.—I had not stated my reason for asking it, but it might be obvious from the next question.

Q. Did you and Mr. Melrose after you had reached that point, either of you, go over toward that so-called barrier? A. No, sir. [356]

Q. Did you or Mr. Melrose go over to the other barrier which you have indicated below there?

A. No, sir.

Q. Did you go over onto that portion of the plat which you have indicated as a steep bank?

A. No, sir.

Q. Did you on that occasion make any observation to determine whether there were any cattle trails through this Opening No. 5 and on toward the east and northeast? That may be answered by yes or no.

A. I did.

Q. Did you find any cattle trails? That may be answered by yes or no.

(Testimony of Ira M. Flocker.)

A. I could not answer it by yes or no.

Q. Well, did you find any trails which were either made by cattle, or otherwise?

A. It looked to me as if cattle or animals could get around that spur from Toejam Mountain by bearing to the northwest, or bearing to the northwest from that west arrow marked on there.

Mr. DENMAN.—Northwest; pardon me.

A. Northwest around the side, not over the summit, the northwest.

Mr. LEWERS.—Would not that be northeast, Mr. Flocker?

A. Well, from the east arrow point it would be in a northwesterly direction, turning more north.

Q. Oh, I understand you. Did you not, in fact, find a well-defined deeply worn trail leading through there? A. No, sir.

Q. Did you make any examination down in the draw between the corner of North's fence and Opening A as to any trail or road leading through there?

A. I did not go down in there. My impression is now that there was a gate down in there, without any gate on it, through North's fence. If it is true, I have not indicated it there, but my impression is now that there was a gate down in there.

Q. Without any gate on it? A. Yes.

The COURT.—Can you point to about the place there? [357]

A. Down about this point (indicating on plat).

Mr. LEWERS.—(Q.) That is near the northwest

(Testimony of Ira M. Flocker.)

end of what you have denominated as Toejam Mountain? A. Yes, sir.

Q. I was more particularly calling your attention, Mr. Flocker, to the territory between the west end of the arrow at Opening No. 5, and what you might call the smaller barrier, and I ask you again whether you observed any wagon road or cattle trail leading toward the north or northeast of that portion of the ground? A. I did not.

Q. Did you look for any?

A. Only in a general way, I observed the ground I was going over.

Q. Will you say that there was not any wagon trail leading up through there?

A. I will not say there was not, of course, I might possibly have overlooked it, but I generally observe those things.

Q. Did you at any time go beyond Toejam Mountain to the east? A. No, sir.

Q. I mean Toejam Mountain as you have indicated it on the map?

A. You misunderstand my legend there.

Q. Is it not a fact, Mr. Flocker, that standing at the point indicated by the east arrow on Opening No. 5, and looking toward the east and northeast, that there is a series of rolling hills gradually getting higher toward the north and east?

A. Yes, sir, that is true south of that stream.

Q. South of which stream, Toejam?

A. No, the head of Siawappe, it was called Jenkins Creek on the original plats, I don't know the real name.

(Testimony of Ira M. Flocker.)

Q. Now, my question was directed toward the territory south of Toejam Creek and north and east from that arrow point, on the east end of Opening No. 5.

A. No, sir.

Q. Then that was not a series of rolling hills gradually getting [358] higher to the high mountain 4 or 5 miles away?

A. I have already testified that was a spur from the Toejam Mountain proper; it was gradually getting higher of course; I know that from my knowledge of topography; and because of the fact that it was getting higher, we were unable to see over the first high point, just about the position that I have the barrier placed; between the arrow point on the west and that natural barrier as indicated, there is a low divide, and that was in plain view, the ground rises steep, quite steep on the northeast of that low divide, up to that barrier, the barrier is almost to the top, that is, I mean to the skyline of the ridge, as viewed from that point.

Q. How long is this barrier that you say was over there that you observed?

A. Well, it extended two-thirds of the way across it.

Q. Well, how long was it?

A. I don't know exactly; I have drawn it in there.

Q. I don't care for what is on the drawing; I want your recollection, independent of the drawing.

A. I should say the rock outcrop was exposed two-thirds of the way across.

Q. Well, in miles or half miles, how long was it?

(Testimony of Ira M. Flocker.)

A. Probably a mile and a half.

Q. Without a break?

A. No, sir, I didn't say so.

Q. Then there were breaks in it, were there?

A. From that point it appeared to be broken to the north of the center.

The COURT.—I don't understand that last answer. To the north of the center line of the ridge? It appeared to be broken to the north of the center line? [359]

A. It appeared to be broken to the north of the center line of the ridge.

Mr. LEWERS.—(Q.) Was that the only place there was a break in it?

A. Of course it didn't extend over to Nelson's fence, because the outcrop on the side of the ridge, and the ridge on that side of the fence was a smooth slope.

Q. Did it form a continuous wall?

A. No, sir, I would not testify to that.

Q. Is it a good barrier?

A. I could only testify to that from my knowledge of other barriers.

Q. Answer the question. Is that a good barrier?

Mr. PLATT.—What do you mean, in contemplation of this case?

Mr. LEWERS.—Or in any case. (Q.) Is it not a fact that that is not a good barrier to stop stock?

A. I would not testify that it would stop stock, no, sir, only in places.

Q. Did you observe on any of your visits stock in

(Testimony of Ira M. Flocker.)

any portion of that territory, in the vicinity of this so-called barrier?

A. I don't remember seeing any up there.

Q. Did you see any indication of their having been there?

A. Well, I was not close enough for that.

Q. Then you don't know, in fact, whether or not there are any cattle trails through what you call this barrier? A. No, sir.

Q. And you never took occasion on any of your visits to go over and find out? A. No, sir.

Q. You regarded that barrier as part of the so-called inclosure, did you not? A. Yes, sir.

Q. Now, when you testified that on your visit in July you found this red fence up south of Opening No. A, you didn't mean to testify that it was put up in July, to your knowledge, did you; that [360] is that it had been constructed during July?

A. No, sir, I could only judge by the appearance of the fence, and what Mr. Petrie told me.

Q. Then all you mean to say is that you observed it first in July? A. Yes, sir.

The COURT.—Mr. Lewers, before you leave Toejam Mountain, I wish you would ask him about the relative elevation of the point where he was standing between North's fence and Toejam ridge.

Mr. LEWERS.—I am glad your Honor suggested that. (Q.) Now, will you answer that question in that form, Mr. Flocker, as to the relative elevation between the arrow point at the east end of Opening No. 5, and what you have indicated here as Toejam Mountain barrier?

(Testimony of Ira M. Flocker.)

A. Well, I should judge 500 feet, perhaps more.

Q. In what distance?

A. In the distance of a mile, and a portion of that distance there is a valley between.

Q. How deep a valley?

A. It is a low divide, relatively speaking, in that ridge.

Q. Would that valley be difficult to cross by cattle, or on horseback? A. No, sir, that valley is open.

Q. An easy passage? A. Yes, sir.

Q. Now, did you make any observations or measurements, or take any bearings to determine the distance you were from this so-called barrier; or did you just measure it by your eye?

A. I just measured it by my eye, and my knowledge of topographic form, and at approximately its position with reference to North's fence.

Q. Now, going from the point that I started from in the other question, at the east end of Opening No. 5, and looking toward the northwest end of what you have called the barrier, what is [361] the difference in elevation between those two points, do you know? A. Well, I don't know.

The COURT.—Give us your best judgment?

A. Well, I should say probably 100 feet or 150 feet.

Mr. LEWERS.—(Q.) That is, the northwest end of this barrier would be 150 feet higher than the point I have indicated? A. Approximately, yes.

Mr. DENMAN.—That is the east point of the arrow?

Mr. LEWERS.—Yes, the east point of the arrow.

(Testimony of Ira M. Flocker.)

Q. Now, how much higher is the northwest end of that so-called barrier than the west arrow on Opening No. 5? A. It would be 300 feet.

Q. Then it is lower over there at that corner of Noble's fence than at the east arrow? A. Yes, sir.

Q. Is there not a low or gradual valley in between, leading toward the northeast?

A. In between what?

Q. The two arrow points.

A. No, the summit of the ridge comes between the two arrow points.

Q. Then there is a ridge between, is there?

A. The main ridge between those two extremes, yes, sir.

Q. And that ridge extends on towards the north-east? A. Yes, sir.

Q. Just as Mr. McClellan described it, wasn't it?

A. And as I testified.

Q. Just as Mr. McClellan described it?

A. No, sir, not as Mr. McClellan described it.

Q. Then his description and his statement that this is a gradual rising ridge toward the north and east, is not correct?

A. Not in so far as he said it was a smooth ridge.

Q. But otherwise it is correct, is it? [362]

A. Mr. McClellan's testimony, I don't know as I should testify what I think about his testimony.

The COURT.—No, it is not exactly the right thing to cross-examine him on another witness' testimony. He can testify as to what he saw without testifying as to another witness' testimony.

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—I will withdraw that question. Simply as to whether he agreed with the testimony or not.

Q. What was the difference in elevation, the average elevation we will say, about the center of Opening No. 5, and a point about a mile southwest in that general country down there?

A. The center of the point between the two arrows?

Q. Yes, take the average elevation in Opening No. 5, and then go about a mile to the southwest, what I want to get at is the comparative approximate difference in elevation, if any?

A. A mile to the southwest would be about the head of the valley, which opens toward Siawappe Creek to the south.

Q. What is the difference in elevation?

A. Not a great deal, if any difference.

Q. Is it not a fact that standing at the arrow at the east end at the point marked arrow, at the east end of Opening No. 5, and looking toward the southwest, there are rolling hills gradually getting lower as you progress? A. Yes, sir.

Q. And does not that same general average of rolling hills extend on toward the northeast when you turn around and look the other way?

A. No, sir, it is not visible, nothing of that kind is visible from that point. As I testified, there is a low divide between the barrier marked there and that point.

Q. Is anything of that kind visible from any point

(Testimony of Ira M. Flocker.)

in there? A. Toward the northeast? [363]

Q. Yes. A. No, sir.

Q. Take a point between a quarter and a half a mile north of this Opening No. A, the beginning of the Nelson fence, I will ask you if standing in that territory and looking off toward the north and east, you didn't see a series of gently rolling hills, gradually getting higher to the mountain 4 or 5 miles away?

A. You do to the east, south of that stream.

Q. And do you not to the northeast?

A. No, sir.

Q. Did you make that examination?

A. I have looked in that direction, yes, sir.

Q. And when you were at that, or approximately that place, did you look towards the southwest?

A. Yes, sir.

Q. And did you not see a series of gently rolling hills, gradually getting lower toward the southwest?

A. Looking southwesterly from that point, you are looking across the apices of the ridges which are running south toward Willow Creek from the main divide between the two creeks, which, as Mr. McClellan testified, is toward the north, or northerly part; that is, it is closer to Rock Creek than it is to Willow Creek.

Q. That is not an answer to the question. Did you not observe toward the southwest from that point a series of gently rolling hills, gradually getting lower?

A. What I call a rolling hill is generally a portion

(Testimony of Ira M. Flocker.)

of the ridge only.

Q. Will you kindly answer my question. My eye may be trained or untrained, Mr. Flocker, but that is not the issue. I want to know what your trained eye saw.

A. I saw a succession of ridges sloping toward Willow Creek from the main divide, which is closer, as I testified, to the creek above. [364]

Q. Were those sharp ridges, or round rolling ridges?

A. Well, they were rolling ridges, they were not sharp ridges; that is, they are more rolling the further down you get toward the junction of the two streams.

Q. Is there anything that you observed on those ridges that would impede the passage of cattle over them? A. No, sir.

Q. Is there anything you observed on the ridges that you say you could see along to the east of the point I have indicated, to impede the passage of cattle? A. No.

Q. Did you find any shearing corral in the vicinity anywhere of these barriers? A. Yes, sir.

Q. Where? A. I can indicate it for you.

Q. I wish you would.

A. Down on the stream (indicates).

Q. Will you mark that with the letters S. C.?
(Witness marks "S. C." on the plat.)

Q. That would be down in the Nelson field, would it? A. Yes, sir.

Q. Were you at that shearing corral?

(Testimony of Ira M. Flocker.)

A. Yes, sir.

Q. Did you observe which way the trails ran from that shearing corral? A. Yes, sir.

Q. Where did they run?

A. I saw a trail running toward the west, down the stream.

Q. Any other direction?

A. I didn't notice, I think it went on east, I didn't notice.

Q. Did you follow that trail toward the west?

A. No, sir.

Q. Do you know where that trail passed through the Nelson fence?

A. I don't know where it passed through, no; I presume it passed through near the cottonwood trees in that opening.

Q. Did any trail run toward the north?

A. I didn't notice any, no, sir. [365]

Q. Did you look for it?

A. No, sir, only in a general way.

Q. Did you look for trails at all?

A. No, sir, only in a general way.

Q. Did you in any of your trips look for trails for the purpose of determining the lines of travel of cattle? A. No, sir, I did not.

Q. Who accompanied you on your first visit?

A. R. F. Haws and H. W. Gray.

Q. Did they go with you across any portion of this territory that you say you went on?

A. Mr. Gray did.

Q. And where did Mr. Haws cross, if he did cross?

(Testimony of Ira M. Flocker.)

A. I don't know where Mr. Haws crossed, he went around, as Mr. Petrie did later, to get around with the buggy.

Q. Did you on that occasion follow on—

Mr. PLATT.—If the Court please, I have not interposed any objection here, because your Honor expressed an interest in hearing what the witness had to say as to the topography of that country, but it does seem to me, it is not necessary to go over all this line of testimony by this examination. If they desire to recall him and make him their own witness, I offer no objection.

Mr. LEWERS.—It is for the purpose of inquiring as to whether he went along the Noble fence. That is all I am after now.

The COURT.—If that is what you want, as to whether he went across the Noble fence, I don't think that is exactly cross-examination here, or proper, but I would like to know what he saw as to the condition of that fence; but if it is drawn out for the purpose of raising a conflict between his testimony and the testimony of any of the other witnesses, as to anything except the exact condition of that fence, I don't care to hear it.

Mr. LEWERS.—It is for the purpose of locating where he went [366] with reference to where somebody else went, to tie the testimony.

The COURT.—Ask the question, and we will know better.

Mr. LEWERS.—(Q.) Did you, either you, or you in company with anyone else on that occasion, go

(Testimony of Ira M. Flocker.)

along the line of what you have marked as the Noble fence? A. I did, I walked along the fence.

Q. And were you alone? A. Yes, sir.

Q. Will you indicate to what point on that Noble fence you walked on that occasion, where you started and where you wound up?

A. I walked along the fence through section 31, in section 32, and took this angle; I didn't take that angle.

Q. By saying you took this angle you mean the angle that turns to the north from the west side of Opening No. 5? A. Yes, sir.

Q. Did you walk up that fence as indicated on your map, towards the north?

A. Not along the fence, walk in a northeasterly direction won't be able to see the fence all along.

Q. How far up did you walk?

A. I should say a quarter of a mile.

Q. And you have indicated on the map Noble's fence a mile and a quarter long, have you not?

A. Yes, sir, making the angle.

Q. Do you know whether that fence goes on further north or not? A. I do not.

Q. And on which visit was it, the first one?

A. Yes, sir.

Q. And did you go along any other portion of that fence on any other of your visits?

A. Mr. Melrose, I think, walked along it.

Q. I am asking what you did, that is all.

A. I don't believe I did, I don't believe I went close enough to observe it on my third visit.

(Testimony of Ira M. Flocker.)

Mr. LEWERS.—That is all. [367]

Mr. PLATT.—(Q.) Just a question or two. In response to a question asked by counsel, you stated that you regarded that barrier as a part of the inclosure, and when you answered that question you were referring to the barrier designated upon the plat as Toejam Mountain. Now, I ask you why do you regard that barrier as a part of the inclosure?

A. Because I thought it had a tendency to keep cattle from getting out of the inclosure, or coming into it.

Q. Because it had a tendency to keep cattle from getting out of the inclosure, or coming into it?

A. Yes, sir.

Q. Now, as a matter of fact, Mr. Flocker, beginning right down here in the southwest corner of this plat, and extending in a northeasterly direction through the inclosure, there is a constant rise in the land, isn't there? A. Yes, sir.

Q. Until it extends clear up here in the northeast to a point designated as Toejam Mountain?

A. Yes, sir.

Q. Is not that true? A. Yes, sir.

Q. In other words, the elevation keeps getting higher and higher as you go toward the northeast?

A. Yes, sir.

Q. Now, counsel also asked you as to whether, as a matter of fact, you went upon the barriers, over the Toejam barrier or the two barriers indicated just south upon the plat. Now, why didn't you go upon the barriers themselves, and examine them?

(Testimony of Ira M. Flocker.)

A. Because I could see them from where,—from the point where I did go, and they are usually not very nice things to walk over.

Q. In other words, as I understand it, you can see a mountain or hill or barrier, without walking all over it, can't you? A. Yes, sir.

Mr. PLATT.—I think that is all.

The COURT.—(Q.) I would like you to tell me what the condition of the North fence was the last time you saw it; that was on your [368] third visit, I think.

A. On my third visit there was a place about where I indicate, a little west of the west arrow of the opening, that one or two posts had been taken away, looked as if —they were out, at any rate, one I think was lying on the ground; the wires were down, lying on the ground, one hanging to the top of the post; looked to me as if some stock had broken through.

Q. Well, was it down elsewhere?

A. I don't remember any other place but that one place.

Q. If it had been down would you not have seen it?

A. Not on my last visit, because I didn't walk along it myself, I did the first time.

Q. Did you see it on previous visits? A. Yes.

Q. Now what condition was it in then?

A. Well, it was an old fence, it was in fairly good condition.

Q. The wires down?

A. Only in one place, it was almost down at one

(Testimony of Ira M. Flocker.)

point at the time of my first visit, it would not turn stock, I should say, if they wanted to go through; it was in rather bad condition at that point.

Q. Was it in condition to turn stock at other points? A. Yes, sir.

The COURT.—That is all.

Mr. LEWERS.—(Q.) Do I understand you, when you spoke of the crest of this barrier, that you mark Toejam Mountain as a thousand feet above the general level of the valley, you refer to the level down around say where the Ranch House is?

A. I think I testified that it was 1500 feet above the general level of the valley; a thousand feet above the general levels of the streams up there, approximately in that position on the map; that is, the beds of the streams. [369]

[Testimony of R. E. Tilden, for the Defendant.]

R. E. TILDEN, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. Your name is R. E. Tilden, is it?

A. Yes, sir.

Q. And you live in Winnemucca, Nevada, at this time? A. Yes, sir.

Q. What is your occupation?

A. Civil engineer and surveyor.

Q. How long have you followed that occupation?

A. Since 1896.

Q. And where?

(Testimony of R. E. Tilden.)

A. Well, I was first junior engineer in United States Engineers and Surveyors of the Red River and Washita.

Q. Where is that?

A. They are both in Louisiana.

Q. How long were you in that service?

A. Well, from the time I was rodman, including the engineer, and after I left the university, about 5 years.

Q. Of what university are you a graduate?

A. State University of Louisiana, in the Engineering Department.

Mr. PLATT.—We will admit his qualifications, if the Court please, to save time.

Mr. LEWERS.—(Q.) Have you ever made any surveys or examinations of any portion of the territory shown on Government's Exhibit No. 1?

A. Yes, sir.

Q. When did you make those surveys or examinations?

A. Commencing in October, 1910, the latter portion of October.

Q. And extending to what time?

A. To December, 1911.

Q. And have you been on the ground at any time since that? A. This year.

Q. I do not mean for the purpose of making a survey, have you [370] been on the ground at all?

A. Yes, sir.

Q. When was that?

A. About two weeks ago, I should think.

(Testimony of R. E. Tilden.)

Q. In whose company generally, did you go on that occasion?

A. Mr. Petrie, Mr. Lamb, Mr. Sheehan, Mr. Lewers.

Q. That is the automobile party that has been referred to, is it? A. Yes, sir.

Q. Now have you made any examination of Exhibit No. 1, as it appears here on the board?

A. Yes, sir.

Q. I will ask you whether or not you have made any tracing of any portion of that?

A. I have the east and northeast portions.

Q. And that tracing you say was made from this exhibit itself? A. Yes, sir.

Q. I show you a paper here, and will ask you if that is the tracing that you refer to? A. Yes, sir.

Q. Now does that map or tracing contain on it anything in addition to what appears on Exhibit No. 1? A. Yes, sir.

Mr. PLATT.—Well, I object; I didn't have a chance to object, if the Court please, before the answer was in, but I ask that the answer be stricken out, on the ground that the tracing itself is the best evidence as to whether it contains anything more than this tracing.

The COURT.—That is true, but he can go on.

Mr. PLATT.—I suppose this is going to be put in evidence; and if it is introduced in evidence, it is the best evidence.

The COURT.—It will have to show something about its accuracy before it is admitted, and I pre-

(Testimony of R. E. Tilden.)

sume it will be admitted and taken for what it is worth, just as the other exhibits are, but before it is admitted, you will have an opportunity to cross-question him. The contents of the map, of course the matter should show for itself, the witness testifies as to its accuracy. [371]

Mr. LEWERS.—The only purpose, the testimony indicating already it was a tracing, was to show wherein the difference was, between the two, as preliminary to its use, that was all. I did not want it to appear that this was represented to be a true tracing in all respects; it was merely a preliminary question.

Q. From what source did you obtain anything that appears here, in addition to the tracing of Exhibit No. 1?

A. From actual field-notes and surveys.

Q. Made by whom?

A. Me, assisted with rodmen.

Q. Now, will you examine that tracing, and I will ask you whether or not those things which are represented on there in addition to what appears on Exhibit No. 1, are correct representations of your own observations taken on the ground?

A. Well, you have on here an irregular piece of ground called Toejam.

Q. Notice the question: In addition to what appears on Exhibit No. 1; that is, those matters on that plat, in addition to what appears on Exhibit No. 1, are they based on your actual observation, and are they correct representations of what you observed

(Testimony of R. E. Tilden.)

on the ground? A. Yes, sir.

Q. Now what portion of Exhibit No. 1 does this tracing cover, generally?

A. The east part and northeast part.

Q. By whom was this drawing made?

A. By me.

Mr. LEWERS.—We offer this in evidence for the purpose of illustrating the testimony.

Mr. PLATT.—Well, if the Court please, I will have to object to it at this time upon the ground there is no testimony to show what the exhibit represents. The witness was interrogated as to whether that exhibit represents in addition to what is shown upon Exhibit No. 1, is a correct exhibit. Now there is no question, [372] and no testimony here showing whether that exhibit offered in evidence represents anything more than those things, in addition to that plat. The inference is, if the Court please, that it represents some of the things upon that plat, the Government exhibit, and some things in addition to that. Now, counsel has only offered in evidence such portions, and only laid the foundation for the offer of such portions of this exhibit, as are additional to the Government's exhibit; and it is impossible for me to determine, and I think the Court too, as to whether that exhibit purports to represent additional things to the Government exhibit, or whether it purports to represent similar things and additional things.

The COURT.—Your objection is that it represents portions of your map, and some things that are not on your map?

(Testimony of R. E. Tilden.)

Mr. PLATT.—Yes.

The COURT.—And that you offer to vouch for the correctness of it, in so far as it is not a copy of your map, is that it?

Mr. LEWERS.—That is my offer.

The COURT.—You don't vouch for its correctness in so far as it is a copy of the map on the board, except that it is a correct copy?

Mr. LEWERS.—That is all.

Mr. PLATT.—As I understand it, there is no testimony showing that that is a correct copy of the plat upon the board.

Mr. LEWERS.—Oh, yes, there is, Mr. Platt.

Mr. PLATT.—Well, if there is I have not heard it. The record is silent as to whether this exhibit is a correct copy of that exhibit.

The COURT.—(Q.) Is that exhibit a correct copy of the exhibit on the board?

A. The portion I have drawn. [373]

Mr. PLATT.—If I may be permitted to ask a question.

Q. Does this exhibit purport to be a copy of the Government's exhibit?

A. Of that portion that has been copied.

Q. What portion?

A. East and northeast portion that is shown.

Mr. LEWERS.—The barrier portion, you mean?

Mr. PLATT.—(Q.) Is it an exact copy of that exhibit?

A. Yes, sir, as near as I could draw it.

Q. Then as I understand it, you testify that this

(Testimony of R. E. Tilden.)

is an exact copy, correct in every detail?

A. As near as I can draw it.

Q. And that it is based upon an actual survey?

A. The part that I did; not the part on here.

Q. Do I understand your testimony to be that the part which you copied of the Government's exhibit you actually surveyed?

A. No, sir, I didn't survey the Government's exhibit.

Q. Did you survey the land represented by the Government's exhibit?

A. A part of it, in that vicinity. There is part drawn on there that I never touched.

Q. Then this map is not a complete representation of the Government's exhibit, is it?

Mr. LEWERS.—We concede it is not.

Mr. PLATT.—(Q.) Now do you testify that all of the delineations upon this exhibit, or upon this plat offered in evidence, are based upon actual survey?

A. The part that I did.

Q. Just the part that you did?

A. Yes, sir. I don't know what the other man did.

Q. Is there any indication upon this offer of the part copied and of the part of it which you made an actual survey of? A. Repeat the question.

Q. Is there any indication upon this offer of the portion of the Government's exhibit copied, and the part that you actually [374] surveyed?

Mr. LEWERS.—We submit that the exhibit offered will speak for itself. I will explain, if you will pardon the interruption. So far as the lines,

(Testimony of R. E. Tilden.)

fence lines, section lines—

WITNESS.—(Intg.) That is Government work, and some streams there.

Q. Just a moment. The notations Toejam Mountain, and the other barrier, alleged barrier, that differs in no respect from the Exhibit No. 1, but the difference comes in certain elevations, notations as to openings in fence, position of stream, and contour of the ground.

Mr. PLATT.—The only difficulty is, if the Court please, it seems to me that an actual survey has been made of a portion, and an actual survey has not been made of another portion; and it is not clear in my mind just what portion has been actually surveyed, and what portion has not.

Mr. LEWERS.—Permit a question there, and we can straighten that out.

Q. You have actually surveyed, have you not, Mr. Tilden, the northeast portion of that alleged inclosure appearing on Exhibit No. 1? A. Yes, sir.

Q. And you have actually surveyed over the ground depicted in this tracing we are now offering in evidence?

A. As to what the Government represents.

Q. That is, in addition to what is represented on the Government plat, you have been over the ground, have you?

A. And except some section lines, and some streams way out, I never went there, that was taken from U. S. Government notes.

Mr. PLATT.—I think we can save time: I will

(Testimony of R. E. Tilden.)

ask leave to interpose an objection afterwards, without waiving my right, after [375] it has been made clear to me just what portion of that plat represents an actual survey, and just what portion does not.

The COURT.—The plat will be admitted subject to the objection, and you can cross question him regarding the particular parts of that map which he actually delineated from surveys of his own.

(Map admitted in evidence and marked Defendant's Exhibit "A.")

Mr. LEWERS.—I will state so counsel and the Court may understand it, our purpose in offering it this way is to have it on exactly the same scale as the other map, for more convenient reference. We had other maps, which, as your Honor may remember, covered far larger territory, that were, by the evidence in this case, excluded, that is, by the rulings, and we have therefore placed it on exactly the same scale position as the other map.

Q. Now, Mr. Tilden, I call your attention to Defendant's Exhibit "A," and ask you to point out on that exhibit generally those portions which correspond and are tracings of Government's Exhibit No. 1.

A. The fence line from the northeast corner of section 32, township 40 north, range 49 east, to the southwesterly direction to an angle; then southerly to the section line between 31, 6, 5, and 32; thence northwesterly to near the west quarter corner of section 31, township 40 north, range 49 east, continu-

(Testimony of R. E. Tilden.)

ing in the same direction for about three-quarters of a mile, also in a general westerly direction through sections 36, 35, 34, 37, township 40 north, range 48 east.

Q. Now, I will ask you—if I may be permitted a leading question—whether or not the fence lines indicated on this tracing correspond in position to the fence lines indicated on Exhibit No. 1?

A. All except from the northeast corner of section 32, around in a northeasterly and easterly and northerly direction, to the end of the fence. [376]

Q. That is, you have at that point extended the North or Noble fence toward the north and northeast, is that correct? A. To the end of it.

Q. Is that extension based on any actual observation or surveys of your own?

A. Actual surveys and measurements made by me and rodmen in November and December, 1911.

Mr. PLATT.—Just a moment. You say that survey was made in November and December, 1911?

A. Yes, sir. Made, not very much in December, but the latter portion of November.

Q. Do you know, as a matter of fact, whether the condition of the fence in November—

The COURT.—I don't believe you had better interrupt.

Mr. PLATT.—It was just laying the foundation for an objection, if the Court please. Your Honor will recognize from the answer that survey was made long after this suit was brought.

Mr. LEWERS.—That goes to the weight rather

(Testimony of R. E. Tilden.)

than the relevancy.

The COURT.—Conceding it is, I shall admit it for what it is worth, anyway. You can have the exception.

Mr. PLATT.—The objection I was going to offer was, it is not shown the fence line was in the same position at the time the survey was made, that it was prior to the beginning of the suit, or at the time.

Mr. LEWERS.—(Q.) How old was that fence, that you observed there, what was its appearance?

A. Its appearance, the wires were very rusty, the wires were cut in many places, and I examined the ends of the wires, which were very rusty, showing it was a very old fence; posts down in many places; the gates were all down; and from the general appearance of the fence, the posts being rotten, it was somewhere about 15 or 20 years old.

Q. I call your attention to the portion of Exhibit "A" marked "Tojam Mountain," as shown on Exhibit 1 of plaintiff, is that [377] portion a tracing of Exhibit No. 1? A. Yes, sir.

Q. And I also call attention down in section 4, leading into section 9, another tracing of a portion of the barrier, and ask you if that is a tracing of the one that appears, substantial tracing, of the one that appears on exhibit No. 1? A. Yes, sir.

Q. Is either this so-called barrier up here marked "Toejam Mountain," as shown on Exhibit No. 1, and the other one below, based on an actual survey or observation of your own, or based on Exhibit No. 1?

A. Based on Exhibit 1.

(Testimony of R. E. Tilden.)

Q. Now I call your attention to certain streams and creeks represented on Exhibit "A"; where did you get those as they appear?

A. Well, from this point—

Q. What is "this point"?

A. Well, the point beginning at the east end of the reservoir.

Q. Willow Creek reservoir?

A. Willow Creek reservoir, in township—it don't show on this one, nor does it on this one, but I can tell you what township it is, township 39 north, range 49 east.

Q. Go ahead.

A. And continuing in an easterly and northerly direction to the junction, to a point below the junction where Nelson's fence crosses Siawappe Creek, from there on these creeks were taken from Government surveys of the township maps.

Q. And how as to the creek marked "Tojam Creek" to the north?

A. It was surveyed by me continually from the junction where it joins Rock Creek, in section 31, township 40 north, range 48 east, in an easterly direction, through the sections as shown on the map, and in a northeasterly direction, and to a point a half to three-quarters of a mile; I don't know what section that is, east of where the Nelson fence turns north.

Q. Nelson's fence? [378]

A. Or Noble's fence turns north.

Q. And from there on, where did you get it?

A. That was taken off township maps.

(Testimony of R. E. Tilden.)

Q. Now, I call your attention to certain designations, such as Nelson's fence, Opening No. A, 300 feet opening at new fence; those were taken from Exhibit No. 1, were they not? A. Exhibit 1.

Q. And the words "Opening No. 5, North's fence to Noble's fence" were also taken from Exhibit No. 1, were they not? A. Yes, sir.

Q. And when the correction was made changing the word Noble's to Nelson's, you also made the same correction on this Exhibit? A. Yes, sir.

(Recess until 1:30 P. M.)

AFTERNOON SESSION.

R. E. TILDEN, continuing in direct examination.

Mr. LEWERS.—(Q.) Mr. Tilden, first without reference to the map, but from your recollection of the ground, will you state in as short form as you can just where you went after you left the opening in the fence to the east of the Willow Creek Reservoir; that is, from the time that you got on horseback, the last time you were over there.

A. Well, we followed around the road, up the east bank of Willow Creek, going in a northerly direction, and crossed at the Siawappe Corrals, where Willow Creek and Siawappe Creek join, from there we climbed the little ridge, and rode along the fence line in a northerly direction, along this ridge, to where the fence turns, [379] I can't see the section there, where the little right angle turns to the right, and then follows up the same Siawappe Creek, going right as close to the fence as we could ride, ten feet, I suppose, until we got to a little place

(Testimony of R. E. Tilden.)

where a spring comes in, or where the road winds around the hill from Willow Creek proper to Siawappe Creek, where our wagon went during the survey, where we hauled our supplies; then we crossed through the fence there; I led the party there, knowing the road.

Q. How did you cross, through the fence?

A. Rode right through it, an opening there.

Q. Go ahead.

A. Then we rode up to the west side of the fence, or west side of Siawappe Creek.

Q. Whose fence or what fence are you referring to now?

A. Well, I would not know whose fence it was; they say it is the Golconda Cattle Company's, in section 17, whatever the township is, township 39. Then in going on up we stopped at a place where the telephone line crosses, which does not show, those maps did not put it on there, and discussed the map we had in our possession; and I showed them the different openings and the gate just a little above me, above the telephone line, where our wagon had driven through going across from Siawappe Creek to Toejam Creek.

Q. Never mind what was said.

A. Then from the telephone line we continued our ride in a northerly direction until we came to the clump of trees, or where there is a space of 300 feet between the end of the fence and what is called Nelson's fence. I don't know who built the fence, in section 8, and from there we looked at the different

(Testimony of R. E. Tilden.)

hills, and drew a slight sketch of the hills on the opposite side of the creek. We also looked down Nelson's fence which ran up a long ravine, and I suppose we could see Nelson's fence for at least a mile and a half, running [380] in a northeasterly direction, slightly northeast, about 10 degrees, I suppose, right along the west side of the fence line, until we got to a point about half way the length of this fence, then we circled around the ridge, the low ridge in there, where we rode our horses around, until we came upon the crest of the summit; from there I pointed out the corner of Nelson's fence, and showed them the direction that I ran the lines. From this point, the snow being too deep, we continued our journey in a northwesterly direction, coming off of this summit onto the bank of Toejam Creek, passing through an opening 312 feet wide; the fence was down lying on the ground.

Q. What fence?

A. Noble's fence, the North fence, as you may call it on there; the fence was lying on the ground, we just rode right through the opening, from this point I directed the attention of the party to the long valley up Toejam Creek. Mr. Lewers asked me if cattle from—

Mr. PLATT.—Object to any conversation.

Mr. LEWERS.—I just want to know what was done.

A. From this point I directed the party's attention to the opening in a deep ravine, not a very deep ravine, say 60 feet deep, below the left top bank of

(Testimony of R. E. Tilden.)

Toejam Creek, where there had been an old gate, and where the fence was down for at least 500 feet, might be more than that, might be wires just hanging on there for more than that distance; some posts were up and some posts were down, but there was evidence of an old gate there which I saw during the survey. We then continued our journey in a westerly direction on the inside of the fence, or next to the Toejam Creek; I pointed out the openings along the line. The next point we came to was an opening, which I think appears a little east of the section line, I cannot see what it is here.

Q. Leave the designation of the openings for the present, and [381] just proceed to tell where you went.

A. That is where I went. We continued the journey on the inside of the fence for about three-quarters of a mile, till we crossed the fence again through an opening, the fence was down, rode right through; then continued the journey on a still westerly direction, we came to where what is called, so-called Golconda Cattle Company's fence and Noble's fence junction, or where Noble's fence turns in a northwesterly direction; then continuing on along the inside of the fence after we passed through this opening, passing along the creek, and climbing a slight raise, 10 feet high, on the inside of the fence, and we passed on down for at least two miles, and passed out of this fence, going on the outside of Toejam Creek, passing through a gate, a regular road through there, wagon-road; thence going still fur-

(Testimony of R. E. Tilden.)

ther west on our journey, we passed on the outside of the fence, till we came to an opening 503 feet wide, or at the upper end of a small field, called the Toejam field; this field had been cultivated and sowed, it had been recently plowed; this field also had two gates at the east end of it. Passing through this field—

Q. By the way, were any of those gates closed at that time?

A. No, sir, nor were they closed when we made the survey. Passing through this field, we endeavored to get out, going a little past the gate, we came back and passed through another gate; thence going still westerly in the same direction, keeping on the outside of the fence, we met the automobile at the junction or a little below the junction of where Toejam and Rock Creek joins, at this point there was another opening 95 feet wide.

Q. Now, will you step down here, Mr. Tilden, and with this short pointer, standing back so that the Court may see, indicate on Exhibit "A" where you went on that occasion that you have now described. Indicate the course that you followed. [332]

A. Which, with the horses or automobile?

Q. With the horses.

A. We caught the horses somewhere, I think, between this opening, halfway between this opening in section 31.

Q. Is that the opening denominated as Opening No. 6? A. Yes, sir, Opening No. 6.

Q. What is the size of that opening?

(Testimony of R. E. Tilden.)

A. Three thousand four hundred feet wide, between corner of fence and corner of fence.

Q. Now, proceed from that opening.

A. Thence we just followed outside of the fence till we came to this junction of creeks, right here, which is called Siawappe Corral, is on this, that junction of the creeks in here, this is the main creek on this side, and this is the old slough on this side, and following on up to this point, we cut across this little hill right here, the fence goes down and goes underneath the hill; we didn't follow that.

Q. On what section? A. Section 20.

Q. Proceed rapidly.

A. And then following in a northerly direction we went down the hill, and crossed the creek here, then crossed an opening right through here.

Q. In what section?

A. Section 17, southeast quarter of section 17, in township—

Q. It is only section 17 on the map?

A. Section 17, thence rode up the west side of this fence, and stopped at the telephone line here.

Q. Will you indicate on that plat where the telephone line is?

A. I think the telephone line I have got a little bit too high as near as I can understand, I don't remember exactly.

Q. Will you mark that with the word "Telephone"?

(The witness marks the point on the map.) [383]

Q. Now proceed, rapidly indicating.

(Testimony of R. E. Tilden.)

A. From that went on up to the top of this grove of trees right in here, right where the junction of this fence joins Nelson's fence.

Q. Is that Opening No. A?

A. That is Opening No. A, about 300 feet wide; thence we continued on to the west side of this fence here called Nelson's fence, and began to diverge to a point about halfway, this fence turned a little up to the northwest, and followed around a ridge, riding on top of this ridge, and going across to a point about this place.

Q. Where is "this place" with reference to section 5?
A. Northeast quarter of section 5.

Q. And which corner of the Nelson fence that you rode toward?

A. Which corner did I ride toward?

Q. Yes, and point it out.

A. That is the one I called your attention to.

Q. That is the one at the east side of Opening No. 5, where the arrow points, is it not?
A. Yes.

Q. Then where did you go?

A. Thence rode in a slightly northwesterly direction, more westerly than northerly, to a point indicated by "312 foot opening" west of the corner, in the northwest quarter of section 5.

Q. And how is that indicated on Exhibit No. 1?

A. That is about right here.

Q. That is the west arrow at Opening No. 5, is it not?

A. At Opening No. 5, near the west arrow. And thence we passed through this opening, and rode on

(Testimony of R. E. Tilden.)

down, crossing the fence at the point about here, 90 feet wide, crossing the fence along here.

Q. In which section? A. Section 31.

Q. Towards what part of the section?

A. South half of the section. Thence rode on the outside of the fence, till we got [384] to this point, the junction of the so-called Golconda Cattle Company fence and Noble's fence.

Q. That is at the township line, is it not?

A. Not township line, but range line, and north of the township line; thence rode right through this fence here, never opened a gate, passed on down to a point about the middle of section 36.

Q. In the next township?

A. In the next township, township 40 north, range 48 east. Right at this point we crossed the creek, following in an old road, running right along here to some point in along the west half of section 35; we found a gate, the gate was down, and we passed through. Then following on the outside of the fence to some point about section 34, I think it is called, saw an opening there, and a field on this side.

Q. Which side?

A. I suppose from the looks of this map, the field would be on the inside, the field would be on the south side.

Q. Proceed.

A. Thence we passed through two gates in this little field, and rode through the field, and passing out of another gate, went on down to the junction of Rock Creek.

(Testimony of R. E. Tilden.)

Mr. LEWERS.—Now, if the Court please, Mr. Tilden was called for the purpose of identifying and explaining this map, and explaining where he went at this time, and we ask permission to withdraw him at this time, and put Mr. Sheehan on again, it being understood that you can cross-examine now if you desire, or that you can reserve your cross-examination of the whole matter until we put Mr. Tilden on again, which we will.

Mr. PLATT.—I think while on this subject, and while everything is fresh in our minds, it might be more advantageous to everybody to permit a cross-examination now, and I think it will expedite my cross-examination. [385]

Cross-examination.

Mr. PLATT.—(Q.) As I understand, you noticed gaps and openings about which you testified, on this last automobile trip that you made? A. Yes, sir.

Q. Do you remember what time of the day it was that you arrived in the automobile, say at this Midas road?

A. Midas road, we went there the day before, about 3 o'clock in the evening, I think; I can give you the date by looking at my book, if you want it.

Q. What time did you start out in the morning of that day to make that tour along that fence?

A. About 8 o'clock.

Q. In the morning; and when did you get back?

A. We got back,—we never came back to Dutton any more at all, just went on to Golconda, passed Golconda about 10 minutes to 3.

(Testimony of R. E. Tilden.)

Q. When did you leave the inclosure that day; what time of the day did you leave this country, the vicinity of that fence? A. What point?

Q. The extreme western point.

A. Just opposite Dutton Ranch, I would say, for Golconda, 10 minutes to 3, I would say.

Q. In order to make the circle of that fence, as you have described it, you left at 8 o'clock in the morning, and finished somewhere around 3 o'clock in the afternoon, is that approximately correct?

A. Yes, we passed the Dutton Ranch at 10 minutes to 3.

Q. You finished before that, didn't you?

A. We finished riding around the fences, I think, about half-past one.

Q. Now, just where, designating upon either plat, did you leave your automobile and take to the horses?

A. We left the automobile in section 31, township 39 north, range 49 east, at the opening which you call Opening No. 6; I suppose [386] somewhere in about that point.

Q. That is between, midway in the opening?

A. Midway along the road, or might have been a little closer to the east side of the road than the west side.

Q. What did you take horses for there?

A. To ride around over the line.

Q. Was it impractical to take the automobile, or ride in it further on?

A. No, sir, we could have driven this automobile

(Testimony of R. E. Tilden.)

around the road up to this point.

Mr. LEWERS.—What point?

A. Up to the northeast quarter of section 29.

Mr. PLATT.—(Q.) That is, as I understand it, the road within the black line fence and inclosure?

A. Yes, sir. From what I understand by the wagon road—

Q. I don't care anything about your understanding, not desiring to be too—

Mr. LEWERS.—Pardon the interruption, Mr. Platt; you refer to the black line fence; it is not your contention that there was any black line fence there at that time, is it? A. No, sir.

Mr. PLATT.—I said, referring to the road within the black line fence, as indicated upon the plat, that is what I mean.

A. That road ran near the red line fence.

Mr. PLATT.—Of course it is our contention that this red line fence afterwards superseded that, and the road ran on the outside.

Mr. LEWERS.—That is what I understand.

Mr. PLATT.—(Q.) Now, what is the general condition of the country southeast of this Opening No. 6? You spoke about riding around some hills there?

A. Southeast of Opening No. 6?

Q. Yes.

A. I ran some lines out there once, and you go from 1320 feet, with very slight rise, then about a 15 foot on, and [387] then you get on a level mesa, and then I suppose for 3 or 4 miles back it was just a regular rise, maybe 4 per cent rise.

(Testimony of R. E. Tilden.)

Q. What hills did you ride around in that neighborhood?

A. We followed the fence line continuously around, stopping at the trees.

Q. Didn't you testify that you made a circuit in and around this section, around some hills, before you took to the fence again?

A. No, sir, followed the fence line; we followed the red line fence—well, this hill I had reference to didn't go over 600 feet away from the fence any time.

Q. Did you go around a hill anywhere?

A. Cut across this way, from this point to this point.

Q. What is "this point"?

A. Northwest quarter of the northeast quarter of section 20.

Q. Then you say you crossed the Nelson fence shortly after that?

A. No, sir, crossed what is called Golconda Cattle Company fence.

Q. Where did you cross that?

A. This point right here.

Q. Why did you cross it there?

A. Well, there was an opening in the fence there.

Q. Where was the opening?

A. Almost right opposite this point right here.

Q. What kind of an opening was it?

A. The wires were down, 30 feet wide.

Q. Do you know when the opening was put there?

A. I don't know, they were there when I made a survey.

(Testimony of R. E. Tilden.)

Q. Why did you cross on the inside of that fence through that opening instead of staying on the outside?

A. Well, there is a road on the creek side, and there was a good deal of snow on the ground, and you could get a better view from this side, because the ground was high.

Q. Now, you have indicated here upon your own plat something which [388] to me would indicate hills or mountains; what does it indicate?

A. That represents your symbol.

Q. Is there anything justifying a symbol such as is represented upon that plat?

A. I never saw anything.

Q. Saw nothing? A. No.

Q. Do you testify absolutely that is level country there? A. No, sir.

Q. What kind of country is it?

A. Undulating.

Q. Is there anything in the topographical condition of the country which would justify a symbol such as is indicated upon both plats?

A. Not as I know of.

Q. I asked you whether the country was level there or not? A. No, sir.

Q. What kind of country is it?

A. Undulating.

Q. What do you mean by undulating country?

A. Up and down.

Q. How high were any of the ups, or hills?

A. I suppose you would go down one valley and up

(Testimony of R. E. Tilden.)

the next ridge, 30 feet from the top of one to the bottom of the other.

Q. You say the extreme height of any of those undulations or hills was 30 feet?

A. On that side of the creek it would be.

Q. How on the other side of the creek?

A. There was a little rocky knoll right in between the two creeks here—I beg your pardon—it was along this way, inside of the fence, and there was another one up a little piece further, with the ravine running up between them.

Q. In which direction was that ravine trending?

A. Running in a southwesterly direction toward the creek.

Q. Now upon the plat marked Government's Exhibit No. 1, and upon your plat, Defendant's Exhibit "A," are indicated symbols, [389] which have been described in the legend of the Government's exhibit as being a natural barrier; is there anything in that section of country to justify a symbol such as that?

Mr. LEWERS.—I desire to object to that on the ground it is not cross-examination, because that is one of the matters I expect to go into very fully with this witness, and I refrained at this time for the purpose of saving time, and the objection of course will not preclude cross-examination on that point. I merely suggest it at this time.

Mr. PLATT.—I don't think the witness was asked about that in direct examination. I withdraw the question.

(Testimony of R. E. Tilden.)

Q. Now, have you compared generally the course and outline of the fences represented upon the Government plat with your own surveys, and with this particular plat known as Defendant's Exhibit "A," with a view of ascertaining as to the accuracy of the plat, the Government's plat, as to the course and trend of the fence lines, and their actual location?

A. I have compared what is shown on this plat.

Q. Now, is the Government's plat, in so far as the comparison you have made, approximately accurate?

Mr. DENMAN.—On the fences, Mr. Platt?

Mr. PLATT.—Yes.

A. As far as they represent not showing any openings; they don't show any openings, we do.

Q. I wish you would indicate the openings upon your plat which are not indicated upon the Government's plat.

Mr. LEWERS.—I would suggest in that connection, although the witness did refer to openings, I did not follow that up, and that is another matter I was going into in detail.

The COURT.—You may go on.

Mr. PLATT.—(Q.) You testified, didn't you, as to certain openings [390] in a fence somewhere along the northern extremity of the fence line; now, as a matter of fact, were not those openings in a fence, not delineated upon this plat at all; were not they openings in a fence in that private field adjoining the fence line as indicated upon the plat?

A. What do you mean by private field, Golconda Cattle Company or somebody else?

(Testimony of R. E. Tilden.)

Q. Either Golconda Cattle Company or somebody else, extending further to the north of the fence line.

A. Well, there were openings also in what you have shown there, and only gates in that private field.

Q. Then as I understand it, in the private field there were gates that you noticed?

A. Three gates.

Q. Three gates in the private field, extending further to the north from the north line fence, as indicated on the plat?

A. No, you have the south fence shown on here approximately correct, and one of the gates is in that south fence.

Q. Do I understand you to say there is another gate directly in that fence along its north line, as shown upon the plat?

A. No, sir, they are cross fences.

Q. What do you mean by cross fences?

A. May I draw it on the board?

Q. Yes.

(Witness draws on blackboard.)

A. There is a gate there and a gate here; now this is the fence that you show approximately on your line here; you come down that direction, and come down here somewhere; I would judge that your map shows coming down on the south fence, coming down here, around this way; that is a gate, and that is a gate.

Q. Well now, let me be brief about this and direct your attention to what I want. I call your attention to the Government's Exhibit, and particularly to the

(Testimony of R. E. Tilden.)

line between Opening No. 4 and Opening B.

A. There was one gate— [391]

Q. Just a moment. (Contg.) And I will ask you whether upon that fence line as indicated upon that plat there is a gate which should be placed upon that plat?

A. I could not tell by your fence how close your fence was drawn; your fence was drawn through the middle of the section, and so is this drawn through the middle of the section, so I could not understand.

Q. Let me ask you again, is the fence of the Golconda Cattle Company as to the distance from Opening No. 4 and Opening B correctly represented upon the Government plat?

A. I should not think it was.

Q. Well, why isn't it?

A. It is not drawn correctly.

Q. Well, how should it be drawn?

A. That map we have not exhibited yet.

Q. As a matter of fact, isn't there a fence belonging to the Golconda Cattle Company, directly connecting Opening No. 4 with Opening B?

Mr. DENMAN.—Mr. Platt, we will admit that your map is substantially correct at that point.

A. Yes, I should think so.

Mr. PLATT.—(Q.) There is, isn't there?

A. Yes.

Q. Now, then, that fence line as shown on that plat, is there a gate or an opening?

A. There is a gate on the south fence line there, I would not say whether it is on yours or not, but we

(Testimony of R. E. Tilden.)

passed through a gate on the south fence line, and these fences were continuous.

Q. You are not in a position to state then whether there should be a gate indicated on that plat within the points I have mentioned?

A. Not on your plat, no, sir.

Mr. PLATT.—It is just with a view of ascertaining what the fact is; our contention will not be that gates cut any material [392] difference, but I desire to get the facts, if I can.

Q. Now do you know from your examination whether Opening No. 4, Opening No. B, Opening No. 3 were actually openings in that line of fence made after the month of July, 1911, or not?

A. This opening was in December, 1910.

Q. That is Opening No. 4?

A. Yes. This opening was in December or November, 1910, I don't know which month.

Q. That is Opening No. 3?

A. That is all you asked, is it not?

Q. How far to Opening B?

A. I never went that far until last year.

Q. These are the only two openings then to which you can testify in response to the question about which I asked? A. Yes.

The COURT.—That is Opening 3 and Opening 4?

Mr. PLATT.—Openings 3 and 4. (Q.) Now, what was Opening No. 4?

A. Opening No. 4 was a wide gate 95 feet wide, or such, kind of a Mormon gate they call them, a wire gate.

(Testimony of R. E. Tilden.)

Q. What is Opening No. 3?

A. Wires were down and a gap in the fence 30 feet wide.

Q. Thirty feet gap.

A. As near as I remember; during that time I never paid any attention to that, just saw it there and drove through it, that is all.

Q. As a matter of fact, you paid no attention to any gaps, did you, until you made your last visit in the automobile and with horses?

A. Oh, yes. This sheep road there, we have it on my map as sheep road, showing the openings, lots of things we have that is not on that.

Q. But as I understand your testimony, you paid no attention to these other gaps on top here at your other visits? A. No, sir.

Q. So you are only able to testify concerning these other gaps [393] as a result of your third visit, made a month or so ago?

Mr. DENMAN.—I object. Your question does not show what is meant by “the other gaps.”

Mr. PLATT.—Well, Opening No. 3, Opening No. 4 and Opening No. 5.

Mr. DENMAN.—Now, if the witness understands. Repeat the question.

Mr. PLATT.—(Q.) You paid no particular attention, as I understand your testimony, to the gaps represented on the Government plat, as Opening No. 3, Opening No. 4, Opening No. 5, and Opening B?

A. You mean from B. on around? I paid no attention to these I said in 1910.

(Testimony of R. E. Tilden.)

Q. Well, what gaps didn't you pay any attention to till your last trip?

A. I wasn't up there, I could not pay any attention to them, wasn't around there until November, 1911. From this point, from Opening No. 6, around to the, well, about half or three-quarters of a mile east of Rock Creek and Toejam Creek, I have never been until 1911.

Q. What month of 1911? A. November.

Q. November, 1911. Then all of the distance you have just indicated you never observed until November, 1911? A. No, sir.

The COURT.—(Q.) Do I understand you did not observe any openings between Opening No. 6 and Opening No. 4, going around on the east side, until November, 1911?

A. No, sir, I saw a great many openings in that space, quite a number of openings.

Q. What is it that you did not observe until November, 1911?

A. From a point in section 31 to a northerly direction, then it is in a westerly direction to about three-quarters of a mile east of the junction of Toejam Mountain.

Q. You did not observe the openings there until November, 1911? A. No, sir. [394]

Mr. DENMAN.—(Q.) You didn't go there until that time?

A. No, sir, wasn't up there, didn't go there until that time.

Mr. PLATT.—(Q.) Well, if you were not there

(Testimony of R. E. Tilden.)

you could not have noticed them, could you?

A. Certainly could not.

Mr. PLATT.—I think that is all, I understand this witness will be called again?

Mr. LEWERS.—Oh, yes, and we will go into the matter of these openings, as well as other matters. Call Mr. Sheehan. [395]

**[Testimony of J. Sheehan, for the Defendant
(Resumed).]**

J. SHEEHAN, direct examination resumed.

Mr. LEWERS.—(Q.) Mr. Sheehan, if you will step this way I will call your attention to Defendant's Exhibit "A," and also to Government's Exhibit No. 1, but first to Exhibit "A." The creek I point out here indicated on the map is Willow Creek, joining there with Siawappe Creek, and running to the north of this creek, here is Toejam Creek, and I call your attention to a red line indicating a fence, finishing up with a black line below and marked Nelson's fence, also to a point marked Opening No. 5, North's fence to Nelson's fence, 1¼ miles, and also to—I refer to Exhibit 1—a long, undulating snake-like object, marked Toejam Mountain. Now, are you able to identify your position with reference to the time you made a visit to that Squaw Valley country?

A. I am.

Q. Where is it that you started on the horseback trip on that occasion? Will you take this pointer and indicate on the map, and describe the spot?

A. We took our horses about at this point.

Q. That would be?

(Testimony of J. Sheehan.)

A. There is the point, about the end of this fence here (indicating); and it was about here on this map (indicating on Defendant's Exhibit "A").

Mr. PLATT.—Now, will you just make a star at the end of that fence there, and mark that.

Mr. LEWERS.—You will have an opportunity to examine the witness.

A. Do you want this marked too?

Mr. PLATT.—Yes, if you please.

(Witness marks points on maps.)

A. Judging the position from the reservoir, it is about here.

Mr. LEWERS.—(Q.) Now, will you describe the topography of that country at the place where you took the horses? [396]

A. The place we took the horses was in a canyon, a flat, wide canyon, that is, with the other canyons coming in there, made a wide place at the point where we took the horses.

Q. Then where did you go?

A. Then we followed along the line of this fence, off in this direction.

Q. In which direction generally?

A. In a northerly direction.

Q. Along what creek indicated on the map?

A. Siawappe Creek.

Q. Now, you have already testified something concerning some cottonwood trees, or a clump of trees; where was that?

A. That was at about the beginning of the Nelson fence, or the end of the Golconda Cattle Company's

(Testimony of J. Sheehan.)

fence, about in this place (indicating).

Q. State whether or not that is the place marked Opening No. A.

A. That line indicates the opening here; yes, sir, that is the point.

Q. Now, from there where did you proceed?

A. We then followed along the line of this fence.

Q. Which fence is that?

A. This is a new fence of Nelson's, to a point about here.

Q. Indicating a point in the northwest quarter of section 4?

A. We did not go quite to the corner of that fence, but almost to it; then we went across the country down to this creek here, down to this ravine here, or canyon rather, it was not a canyon either, crossing this fence in here somewhere (indicates).

Q. Which fence?

A. Well, it is indicated here as—

Q. Could you find it on Exhibit 1?

A. North's fence

Mr. LEWERS.—Have you any objection to my putting the words "North's fence" on here? [397]

Mr. PLATT.—No.

("North's fence" is marked by counsel on Exhibit "A.")

Mr. LEWERS.—(Q.) Then where did you go?

A. We followed the line of that fence, sometimes on one side and sometimes on the other, down this Toejam Creek.

Q. And where did you finally again take the auto,

(Testimony of J. Sheehan.)

does it show on Exhibit "A," compare it with Exhibit No. 1?

A. We took the auto about in here somewhere (indicates on Exhibit "A").

Q. Well, without reference to the map, can you describe the place that you took the auto, that is, from your recollection of the trip, on what creek was it?

A. On this Rock Creek; we had passed Toejam Creek; I believe it was down here on Rock Creek somewhere.

Q. Down on Rock Creek somewhere? A. Yes.

Q. And is that point indicated on Exhibit "A"?

A. I don't believe it is, I think it is below this place here.

Q. Now, starting out there, when you reached a point where the cottonwood clump of trees are, will you state what observations you made of the country?

A. It was rolling hills.

Q. Just what you did, before you describe the country. What efforts did you make to see what sort of a country it was?

A. Well, we would stop every here and there, and would look in both directions all around. Our attention was called to what was supposed to be barriers; we examined them and talked about them, as to whether or not we could ride over them, and all that kind of conversation.

Q. Now, starting down there by that clump of trees, state whether or not you looked at the country to the east or the northeast.

A. I did, both directions.

(Testimony of J. Sheehan.)

Q. And will you describe what you saw? [398]

A. Nothing but mountainous hills.

Q. Describe those hills.

A. Well, they were covered with sagebrush and snow, there were no barriers that I could see anywhere, except possibly away off at a distance of several miles, but anywhere that I could look and see around here, I saw no barrier or rim-rock that I thought I could not ride over with a horse.

Mr. PLATT.—Of course, if the Court please, we make a motion to strike out at this time, in order to complete the record, that any testimony of what is a barrier or what is not, is a conclusion of law, and an opinion of the witness, and, in our judgment, is improper. It is in line with the same objection we have interposed to questions before, and I move to strike out now, because the question propounded I think was proper, but the answer incorporates and includes more than the question, so I ask to strike out such portions of the answer as refer to the witness' opinion or conclusion as to what constitutes a barrier.

Mr. LEWERS.—I expect to inquire carefully as to just what he did see.

The COURT.—I will allow that to stand, subject to the objection. It will be the same ruling and same exception. As to this not being responsive to the question, that is another matter.

Mr. LEWERS.—(Q.) Will you state the character of the mountains or hills which you say you saw to the east and the northeast from that clump of cottonwoods, as to whether the surface or crests of those

(Testimony of J. Sheehan.)

hills were rough, rounded, smooth, or what they were?

A. They were rounded, some places rocks sticking over them.

Q. And for what distance could you see them, approximately? A. For possibly 3 or 4 miles.

Q. Now, did you see anything in there, and if you did, describe it, in the way of an obstruction to the passage of animals? [399]

Mr. PLATT.—I object, if the Court please, upon the ground that the question is leading; and upon the further ground that it calls for an opinion of the witness as to what is an obstruction. The witness is an intelligent person, and is able to describe what he saw without, in my judgment, drawing any conclusions.

The COURT.—I think I will allow that to stand. Of course the use of the word “obstruction” there calls attention to the description of what he wants. He can describe what he saw, and the Court will decide whether it is an obstruction or not.

Mr. LEWERS.—I will withdraw the question, and ask this—

Mr. PLATT.—Withdraw the objection.

Mr. LEWERS.—(Q.) In looking out in those directions you have mentioned, describe what you saw on those rolling hills you have described, in the way of anything that was there.

A. Well, they are hills typical of that section of Elko county; they were covered with snow and sagebrush, and raising in this direction.

Q. By “this direction” what direction do you mean by the compass?

(Testimony of J. Sheehan.)

A. To the northeast, I believe it would be.

Q. How much snow was there there?

A. I should say a foot or a foot and a half, some places it was deeper where it drifted.

Q. Were any of those hills bare?

A. Yes, in places, where the wind had blown them.

Q. How about the tops of those hills that you could see, as to snow?

A. They were all covered with snow, except where the rocks would stick through. That is, you have reference to hills that we passed over?

Q. No, to hills that you could see to the northeast?

A. Well, the tops of them looked as though the snow had been blown off. [400]

Q. Then were the tops covered with snow or not?

A. No, these all here looked to be bare; I will say those we had ridden over were covered with snow, but these up here looked as if the wind had blown the snow off, we could see that.

Q. Now, where was it you said you could see those hills that were bare?

A. Off in this direction (indicating).

Q. That is which direction? A. Northeast.

Q. I call your attention to Exhibit No. 1, pointing to a place marked Opening No. A, where you have testified the clump of trees was, and I call your attention to an irregular mark along there, denominated below here, barrier, will you state whether you looked in the direction of where that alleged natural barrier stands? A. I did.

Q. What did you see there?

(Testimony of J. Sheehan.)

A. Well, I didn't see that. I saw the same hills that are around through here.

Q. What kind of hills?

A. Rolling hills, sloping from this canyon in here, up, and looked as if they sloped again the other way after getting on top.

A. Now, from your experience as a cattleman, and your observation as such, was that a country that cattle could pass over?

Mr. PLATT.—Same objection as we have heretofore made, if the Court please.

Same ruling. Same exception.

Mr. LEWERS.—Referring to the point indicated on Exhibit No. 1 as a natural barrier.

A. May I be permitted to answer that?

Q. Yes. A. What is the question, please?

(The reporter reads the question.)

A. In my opinion it was a country that cattle could pass over.

Q. Now, after you reached that clump of cottonwoods, I understand you to testify that you went northward along what is known as Nelson's fence?

A. Yes, sir. [401]

Q. Now, did you make any observations of the country while you were passing along there?

A. We did.

Q. On which side? A. Both sides.

Q. What do you mean by both sides?

A. Both sides of us; well, practically all around us, we observed the country all around.

Q. Now, taking a point, say, a quarter of a mile

(Testimony of J. Sheehan.)

above the cottonwoods, did you anywhere in that vicinity make such an observation? A. We did.

Q. Now, what was the nature of the country that you observed toward the northeast on that occasion?

A. Well, just the same hills, and the same view almost, only a little higher up, just the same mountainous hills.

Q. What was the character of those hills as compared with what you have described down below?

A. Very similar to the hills that were below there.

Q. And what was the character of the hills to your left, or toward the southwest?

A. That would be off in this direction (indicating)?

Q. Yes. A. Just those rolling smooth hills.

Q. How did they compare with those to the east and northeast?

A. In character about the same, only lower.

Q. Now, as you went farther north along that Nelson fence, did you make any further observation of the same kind? A. We did.

Q. And what was the character of the hills that you observed to the east and northeast then?

A. I saw no change, they were the same thing.

Q. And carrying that again clear across to the point where you reached the Noble fence, what was the character of the hills that you observed to the east and to the northeast? [402]

A. Just the same all the way along.

Q. How far could you see, approximately, toward the east and northeast, at different points along that line? A. I should judge 3 or 4 miles.

(Testimony of J. Sheehan.)

Q. Now, I call your attention to Exhibit No. 1, and to a long, irregular snake-like thing, labelled Toejam Mountain, and I will ask you whether or not you saw that as indicated on the map?

A. Well, no, I didn't see any mountain by that name, never heard that name for a mountain; I have heard the creek named Toejam.

Q. Aside from the name, that is denominated on the exhibit as a natural barrier, did you see any mountain, rim-rock, natural barrier, or anything corresponding to that, if so, describe exactly what you did see?

Mr. PLATT.—If the Court please I think that is manifestly leading.

The COURT.—Strike out the first part of it, and simply describe any elevation you saw to the northeast.

Mr. LEWERS.—That is all I want. I will withdraw the question and adopt the Court's question.

A. The first elevation of any consequence whatever, from this around through here, would be what I believe is known as Independence Mountain, which would be several miles from this point up here; that looks as though it might have some very high rocks after you get up on that mountain.

Q. And about how far off was that, as near as you could judge? A. From where we were in here?

Q. Yes.

A. I should say it would be 5 or 6 miles.

Q. Now, I will ask you to describe the territory that you observed toward the east and northeast be-

(Testimony of J. Sheehan.)

tween you and those mountains; state what you saw on the territory, those mountains called Independence Mountains. [403]

A. Between Independence Mountain and where we were?

Q. Yes.

A. Well, they were small mountains; that is, they were considered by some as very large mountains; they were larger than these that are here, but they were rolling, sloping hills, very similar to around in here.

Q. By "around in here" indicate where.

A. Indicating along this cottonwood clump, that way, went up here, then there is a gradual elevation, they will get higher off in this direction.

Q. Now, describe anything that you saw in the way of rocks on those mountains.

A. Well, at intervals we find rocks sticking up, some of them look to be high, but not continuous.

Q. You say they were not continuous; describe the intervals between them, what was the character of that?

A. Well, between would be just—well, I had better describe them, they looked like what the prospectors would call blow-outs or clips of rocks standing up, some of them possibly would be the width of this room, looking off at a distance. You mean off in this direction?

Q. Yes. What I want to get at is, what was the character of the ground on those hills, between those blow-outs?

(Testimony of J. Sheehan.)

A. The same as on these hills here, sagebrush, rolling, sloping hills.

Q. Basing your answer on your experience and observation as a cattleman, was that a country through which cattle could pass? A. It was.

Same objection, ruling and exception.

Q. Is that such a country that cattle would graze over it? A. Yes.

Q. Is it such a country as cattle would graze over without being driven? A. Yes, sir. [404]

Q. Now, calling your attention more particularly to the country you actually rode over, was that such country as cattle could pass over?

A. Yes, sir, it was.

Q. Well, in saying they could pass over it, what do you mean?

A. I mean that cattle would pass over it at their own will at any time they wanted to.

Q. And how did it compare with country farther to the southwest?

A. About the same, a little rougher along here than it is down in here.

Q. Now, Mr. Sheehan, will you describe what you saw of that Noble's fence, tell all about it.

A. Well, we followed the line of that fence quite a distance, sometimes on one side and sometimes the other; we came to places where it was down, covered with snow, we would pass over it. It was an old fence built of barb wire that they don't use now, you don't see much of it. In places the posts were decayed and broken off, or blown over; the fence looks

(Testimony of J. Sheehan.)

as though it has not been kept up for a number of years.

Q. What was the condition of the wires, as to their appearance?

A. The wires were wires that were used in years gone past.

Q. What was their condition, as to preservation?

A. In some places it was bad, other places it was all right.

Q. I mean as to whether or not it was rusty.

A. Yes, it was rusty.

Q. And was the snow deep enough at any point on there to cover any of the posts that were standing?

A. No, sir.

Q. How much snow was there along through there?

A. About a foot or foot and a half, probably.

Q. Was that snow continuous? A. No, sir.

Q. What do you mean by that?

A. I mean that in places it was drifted and barren, the ground [405] was exposed, and as we went down westward, it gradually lessened until it disappeared.

Q. That is, the snow disappeared? A. Yes, sir.

Q. What would you say, from appearance, was the probable age of that fence?

A. I remember seeing that wire and handling it 20 years ago; it was wire that was painted at one time black, the barbs were different from the wires that are used now; it appeared to be some years.

Q. How about the posts on that fence, did you observe any of them? A. A few of them, yes, sir.

(Testimony of J. Sheehan.)

Q. And what was their condition?

A. They were old posts, broken off, rotted off, some places.

Q. Now, Mr. Sheehan don't answer until counsel has an opportunity to object. Calling your attention to Exhibit 1 and to that portion of it marked Toejam Mountain, and denominated in the legend as natural barrier, did you see any such thing there?

Mr. PLATT.—No objection.

A. I did not.

Mr. LEWERS.—(Q.) Was there any such thing there? A. Not that I could see.

Q. Did you see that territory where it is represented to be? A. I did.

Q. Did you examine it closely?

A. From our horses, we did not go over onto that ground.

Q. Could you see that territory distinctly?

A. I could.

Q. Did you observe any such thing as that in looking? A. I did not.

Q. Now, turning to Exhibit 1 again, and the lower so-called natural barrier, did you observe that particular territory? A. I did. [406]

Q. Did you see that barrier?

A. I did not see a barrier; I saw one bunch of rocks sticking up there.

Q. How big?

A. Oh, I could not say, it was on a little point, as I remember it, comes down into the slope from a little to the north of the spring, near the end of the Nelson fence.

(Testimony of J. Sheehan.)

Q. Near the end of the Nelson fence; and where was that with reference to this ravine you have told about?

A. Well, it is on the northerly slope of that ravine, running off in that direction.

Q. In your opinion as a cattleman, was that rock that you saw sufficient to turn cattle from going through that country?

A. No, it would not bother them going through the country; they could not go over that cliff of rocks, though, they would have to go around the rocks.

Q. From your observation of the ground, would they have any difficulty in going around it?

A. No, sir.

Q. How long was that cliff of rocks you have described?

A. Well, it didn't look very large; it reminded me just about like this building sitting in that street.

Q. What do you mean by that?

A. Just looked like a building sitting up there, or a cliff of rocks, probably 100 feet or 75 feet in length; I don't know how far it would be either way; it was just on a point of a hill, as I remember it.

Q. You mean in the nature of sort of a promontory sticking out? A. Yes, about like that.

Q. And was it a mile long? A. Oh, no.

Mr. PLATT.—I ask that that be stricken out, if the Court please. I don't see why I should be compelled to object to this kind of questions all the time Why not ask him how long it was.

Mr. LEWERS.—That is all. [407]

(Testimony of J. Sheehan.)

Cross-examination.

Mr. PLATT.—(Q.) Mr. Sheehan, if that thing as big as a house, or as big as a building, as this building, were set between two fence posts, would you call it a barrier?

A. If the fence posts were close enough together I would.

Q. It would be a barrier, would it?

A. Yes, sir.

Q. Well, suppose the fence posts were 10 feet on the other side of this big thing, would you then call it a barrier?

A. Ten feet on the other side of it?

Q. Yes.

A. Well, I didn't go right over onto that, I don't know about the other side; but if it was 10 feet on the other side—

Mr. PLATT.—You understand my question, don't you?

Mr. DENMAN.—Let him finish the answer. We object to the interruption.

Mr. PLATT.—I ask that the answer be stricken out on the ground it is not responsive to the question.

The COURT.—Ask another question.

Mr. PLATT.—(Q.) Suppose this thing I hold in my hand represents something as fixed, and 10 feet on this side is a post attached to a fence, and 10 feet on this side is another post attached to another fence, would you call that a barrier?

Mr. LEWERS.—If the Court please, I make the same objection counsel did; it is calling for the con-

(Testimony of J. Sheehan.)

clusion of the witness as to the meaning of a barrier; and the further objection that it is a hypothetical question, not based upon testimony in the case that there is a fence connected in any way with this jot of rocks that he has described.

The COURT.—The objection will be overruled. You may have an exception. [408]

A. It would be a barrier in a way, but if the post was 10 feet away from it it would not be.

Q. Your idea of a barrier is something that must absolutely obstruct, is that true?

A. Yes, sir. That is, something that will prevent the free coming and going of cattle or stock.

Q. That is your idea of a barrier? A. Yes, sir.

Q. Now, suppose this barrier 75 or 100 feet long, confronted a lot of cattle that were tending toward the center of it, and they were trying to get upon an inclosure on the other side, and their free and ready access would be impeded because they would have to go around that barrier, and to go through an opening 10 feet on the other side of it, would you call that a barrier then? A. No, sir.

Q. You would not?

A. No, sir. If cattle and sheep had only to go 100 feet to get around that barrier, I would not call that a barrier.

Q. You would not call it a barrier? A. No, sir.

Q. And that is your idea of a barrier?

A. Yes. You find those kind of barriers in all these hills; you find those kind of barriers in all our mountains.

(Testimony of J. Sheehan.)

Q. Suppose there were a hill 500 feet long, over which cattle had to climb, making a considerable effort to get over, in order to get into an inclosure, but suppose if they went to either side of the hill they could go through a gate 50 feet wide, would you say that that was a barrier, impeding the ready access of those cattle to the inclosure?

A. No, sir, I would not.

Q. You would not call that a barrier?

A. No, sir.

Q. Suppose that hill or mountain were 2,000 feet long, and at the end of it there were 50 feet along on each side?

A. That would be a barrier.

Q. You would consider that a barrier?

A. Yes, sir. [409]

Q. Then it depends on the dimensions of the hill or mountain, before you would say whether it is a barrier or not?

A. Well, yes, certainly.

Q. Who suggested that you take this trip, Mr. Sheehan?

A. Mr. Lamb.

Q. Mr. Lewers accompanied you, did he?

A. Yes, sir.

Q. What did you go for?

A. Went for the purpose of looking that ground over.

Q. For any other purpose?

A. No, sir.

Q. Did you know at that time you were going to testify in the case?

A. Not particularly, no, I went for that purpose, and also for recreation, for the chance to get back in that country.

(Testimony of J. Sheehan.)

Q. Did anybody suggest what you were to look for?

A. Not until we got up there with the horses, and then we talked it over.

Q. Then you didn't have any conversation as to the purpose of your trip, or what you went to look for, until you left the automobile and took to the horses?

A. Yes, I believe we did before that, but we didn't—

Q. Well, was there anything said in the automobile upon the trip to the effect you would not find any barriers or inclosures up there, and they wanted you to go up there and look for those kind of things?

A. There may have been.

Q. In other words, the entire sentiment expressed in the automobile was, when you got up there you won't find those things the Government is claiming, is not that true?

A. That seems to be true, not only in the automobile, but in the community I have heard it.

Q. In the whole community? A. Yes.

Q. You went up with the idea of corroborating the ideas of the people in the automobile, and corroborating the sentiments of the [410] people in the community?

A. Partly for that and partly for my own recreation.

Q. Those were the two reasons? A. Yes.

Q. As a matter of fact, you didn't go up there in a fair frame of mind? A. I did.

Q. Didn't you go up there to corroborate those

(Testimony of J. Sheehan.)

sentiments expressed to you?

A. No, I went up there, and if I saw they were there, I would say so.

Q. Upon which side were you leaning when you went up there? A. None at all.

Q. None at all? A. No, sir.

Q. Did you have the same sentiment as the other people in that community?

A. I did after I made the trip.

Q. Had you before?

A. No, sir, I knew nothing about it then.

Q. You had expressed no opinion, and had no sentiment as to the other people in that community?

A. I think not, they were nearly all strangers to me.

Q. How do you know that sentiment existed in that community?

A. Because talking to other men afterwards about the thing, and while going on our trip.

Q. You talked afterwards about it, and upon the trip about it? A. Yes, sir.

Q. Did anybody say on the trip, that is no barrier, and that is no inclosure?

A. I think we all said that.

Q. And that was the general expression of opinion, wasn't it, as made, going around the fence?

A. Yes, sir.

Q. Now as a matter of fact, you don't know what the legal definition of a barrier is, do you?

A. No, I don't know what the legal definition would be.

(Testimony of J. Sheehan.)

Q. And as a matter of fact, you don't know what the legal definition [411] of an unlawful inclosure is, do you?

Mr. DENMAN.—Object to that question on the ground there has been no question as to the inclosure.

The COURT.—He has not testified about an inclosure, he has used the word barrier.

Mr. PLATT.—I withdraw the question.

Q. You say you don't know what the legal definition of a barrier is?

A. I don't know what the law would call it, no, sir.

Q. And you don't know what the legal definition of a gap is, do you?

A. Well, I certainly know what a gap is, but I don't know what the legal definition is.

Q. But you don't know what the legal definition is?

A. No, I do not.

Q. How much higher, Mr. Sheehan, was the territory or country represented as in the northeast section of that plat than the country further down, say in the southwest corner?

Mr. LEWERS.—Do you mean down at the Ranch House?

Mr. PLATT.—Yes; I mean down in the southwest corner, whatever that is.

Mr. DENMAN.—Southwest corner of what, Mr. Platt?

Mr. PLATT.—Of the plat.

A. Oh, it is considerably higher.

Q. Do you know about how much higher?

A. No, I do not.

(Testimony of J. Sheehan.)

Q. Well, it was up in the snow line, wasn't it?

A. Yes.

Q. Did you find any snow down at the southwest corner? A. No, sir, we did not.

Q. Was it dry down there?

A. There was snow, a little, around the sagebrush, but nothing to speak of.

Q. Not very much? A. No, sir.

Q. There was much more snow, wasn't there, away up in the northeast corner where you were than there was down in the southwest [412] corner?

A. Yes, sir.

Q. Was the country up there very well covered with snow?

A. On the same elevation across Rock Creek there was no snow at all, but on the other side where we were, there was a foot or foot and a half of snow.

Q. Did that completely cover the country?

A. Yes, sir, except where the wind had blown it off.

Q. Except where?

A. Except where the wind had blown it off.

Q. Had you ever been up there before, Mr. Sheehan? A. Not on this side.

Q. Had you ever been up into that section shown on the plat as the northeast section of it?

A. No, sir, I never had.

Q. You know that is good grazing land up there, if it was pretty well covered with snow?

A. Well, judging from the general character of the country, and from the hills that were exposed.

(Testimony of J. Sheehan.)

Q. That is how you reach that conclusion?

A. Yes, sir, and from my knowledge of that country up in there.

Q. Where do you get your knowledge?

A. I used to ride around that country in early days, that is, not on this side, from the other side, around towards the Tuscarora side.

Q. That is, the knowledge of that country which you have, was derived from your actual knowledge of country away from there, is not that it?

A. Yes, you might put it that way, that is about it.

Q. Now, in response to one of the early questions asked by counsel in your direct examination, in which he asked you concerning the topography of that country represented in the northeast corner of the plat, I have a memorandum here that you answered, "Nothing but hills and mountains"; now what did you mean by that. "I saw nothing but mountains and hills," and after that you qualified [413] it by saying for 3 or 4 miles; what did you mean by that?

A. That was about as far as we could see from there; we then could see a higher mountain off, which I have described, which I understand to be Independence Mountain.

Q. Then I understand from your testimony, as you stood down here, say along the line represented by North's fence, and looked in a northeasterly direction, you saw nothing but hills and mountains?

A. That is all, with ravines of course.

Q. With ravines. Now it was a mountainous

(Testimony of J. Sheehan.)

country, was it not? A. Yes.

Q. There is no question about that, is there?

A. No.

Q. It was certainly a mountainous country?

A. It was certainly a mountainous country.

Q. As a matter of fact, you would call this north-eastern section a mountainous country, wouldn't you?

A. I would call it all mountainous country.

Q. You would call all this section in there mountainous country? A. Yes, all mountainous.

Q. Now, counsel asked you, Mr. Sheehan, as to whether this thing here shown upon the plat as Toejam Mountain, as to whether you actually saw that thing; now as a matter of fact, do you know what that thing represents?

A. No; I didn't see anything there like it.

Q. You didn't see any creature like that, did you, represented upon the plat?

A. No, and I didn't see any mountain like that.

Q. You didn't see any mountain just as it is depicted on the plat? A. No.

Q. When you looked up in that northeastern section of land you say you saw a mountainous country, don't you? A. Yes.

Q. And it was mountainous, was it not, compared with this country [414] down here over which I am pointing my pencil?

A. Yes, there is a difference.

Q. Now is not there quite a pronounced difference?

A. Yes.

(Testimony of J. Sheehan.)

Q. Between the northeast section of that plat and the part indicated as Government land, within these creeks?

A. Yes, sir; those down in there are rounding, lower hills, while up here they would break more abruptly.

Q. In other words, this seems to be a rounding, rolling country, and I suppose flat in places?

A. Well, might have been, we didn't go down in there.

Q. You didn't go down in there? A. No, sir.

Q. But as distinguished from that, this northeast section was a hilly, mountainous country?

A. Yes, sir.

Q. Now, Mr. Sheehan, in your experience as a farmer or rancher or stockraiser, did you ever know of a new piece of barb wire being placed out all winter, and subjected to rains and storms and winds, and the next summer evidencing rust?

A. Place it out over winter, and find it rusted next spring?

Q. Yes. A. No, not generally.

Q. Well, did you ever see it?

A. No, sir; I don't know as I have.

Q. You don't know as you have?

A. Not for one season.

Q. Suppose you placed it out three or four seasons in the same way, does it ever get rusty?

A. Sometimes, yes, sir.

Q. In your judgment, is a barb wire fence up 6 or 7 years an old fence?

(Testimony of J. Sheehan.)

A. No, not if it is put up with proper posts, and so forth, it is not an old fence in 6 or 7 years.

Q. And after having been exposed to the weather and the climate for that length of time, it would not be extraordinary, would it, if it were rusted?

A. Well, yes, in 6 or 7 years barb wire [415] hadn't ought to rust in that time.

Q. Did you ever see any rusty at the end of that time?

A. Well, I don't know. We have some barb wire around different ranches, some of it is rusty, and some is not; I don't know how long it had been there.

Q. As a matter of fact, can you tell the age of a fence by the rust on it?

A. No, I don't think you can, only by the general appearance of the fence, it gives you an idea.

Q. Now, you didn't go up there, and never have been along that fence line until this automobile trip about which you testified? A. That was all.

Q. And, of course, so far as the condition of the North fence was concerned, you don't know whether it was pulled down or fell down or when it was pulled down or when it fell down, do you?

A. I don't know, only from my own knowledge as to the looks of the fence, and where it had fallen over.

Q. Well, you don't know whether it fell over two or three days before you got up there, do you?

A. It could not have fallen over that soon; some places indicated it had been down for some time; you could tell from the posts where they had rotted off, and from the way the wire had lain into the snow and

(Testimony of J. Sheehan.)

mud, it had been down for some time.

Q. But you don't know whether it fell down or was pulled down, do you? A. No, I don't.

Q. Did you examine all of the gaps and gates and openings in the fence as you went around it that day?

A. I didn't all of them, no, sir; only those through which I passed.

Q. And, of course, those through which you passed you didn't know, and don't know now of your own knowledge, when they were put in the fence, do you?

A. No, sir; I do not. [416]

Mr. PLATT.—I think that is all.

Redirect Examination.

Mr. LEWERS.—(Q.) Mr. Sheehan, what kind of wire is ordinarily used within the last few years for building fences?

A. Generally the galvanized iron, without paint.

Q. And was this galvanized wire?

A. No, sir; I don't think it was, it was coated with a black paint in its early—when it was first put on.

Q. Will you describe the kind of barbs it had on with reference to the kind that is used nowadays?

A. The kind that is used nowadays seems to be made out of a wire; and that seemed to have been made out of more of a metal, that is, the barbs were heavier, and different shape than what we use now.

Q. Well, would you denominate that old-fashioned wire or modern wire?

A. I would say it was old-fashioned wire.

Q. Now, what was the appearance of that Noble fence as to whether it had been torn down, or fallen

(Testimony of J. Sheehan.)

down by decay?

A. The impression I got was that it had fallen down, where we had passed over it.

Q. Now, you have been asked several times with reference to your observation of the hills and mountains to the east and northeast from where you crossed that gap, and those to the southwest; now, what was the difference in those mountains as to their character, other than the difference in elevation?

A. Well, they were all rolling hills, until they passed up to the east of where we went across with the horses, then they were larger, more mountainous, a little more abrupt, and not quite so rolling as they were to our left.

Q. How far from where you were did that character change? [417]

A. I should say—off to the northeast?

Q. Yes. A. From 2 to 4 miles.

Mr. LEWERS.—That is all.

The COURT.—(Q.) Mr. Sheehan, did you cross any ridges? A. Yes, sir.

Q. Where was that?

A. We started down, before we came to the Nelson fence, we went over a ridge.

Q. Where was that; could you point it out to me?

A. Yes, sir. After coming up this Siawappe Creek, about here where there is a jog in the fence, we came up a ridge here, and then after passing the telephone line to this spring (indicating on plat); then we started to climb a ridge, we went up this ridge until we got up in here, and we seemed to reach what

(Testimony of J. Sheehan.)

we usually call the summit of this ridge.

Q. This ridge, which direction does that run?

A. It seems to run down this way, northeast and southwest. We climbed up this ridge, then along here, and then we crossed down and went back down into this little valley or canyon down here.

Q. Were there any ridges running there, except northeast and southwest?

Yes, sir, I think there was. One place we went up here was quite steep; it was running in the opposite direction from what this one was here.

Mr. DENMAN.—(Q.) What section is that where you say it was quite steep, Mr. Sheehan?

A. It is not indicated here.

Mr. LEWERS.—Will you indicate the point, and then we will try to locate the section.

A. It was just after we scared up that big flock of mallard ducks, and I was watching the ducks more particularly, but I think it was along in here somewhere (indicates).

Mr. LEWERS.—That would be in section 20, on Siawappe Creek? A. Somewhere in there.

[418]

The COURT.—(Q.) Were there any watercourses you crossed going toward the south from Willow Creek, or toward the east? A. Going back?

Q. No, toward Willow Creek or Siawappe Creek?

A. Yes, sir, there were creeks came in from different ways, small creeks running down in the ravines.

The COURT.—That is all.

Mr. DENMAN.—If the Court please, I desire to be sworn. [419]

[**Testimony of William Denman.**]

WILLIAM DENMAN, after being sworn, testified as follows:

Mr. LEWERS.—(Q.) Your name is William Denman? A. Yes, sir.

Q. And you are an attorney at law?

A. Yes, sir.

Q. And one of the counsel for the defense in this case, are you not? A. Yes, sir.

Q. Were you employed in connection with the matters involved in this suit, or any of them at any time during the year 1911? A. Yes.

Q. Were you in the month of June, 1911?

A. Yes.

Q. Are you acquainted with Mr. Platt, the United States Attorney? A. I am.

Q. Did you at any time in June, 1911, have any conversation with him with reference to any matters involved in this suit? A. I did.

Q. Calling your attention more specifically to the territory involved, where the so-called natural barrier is, did you have any conversation with reference to that? A. No.

Q. Did you have any conversation with reference to the entire alleged inclosure? A. Yes.

Q. Will you state what the conversation was?

Mr. PLATT.—I would like to know what the purpose of this examination is.

Mr. DENMAN.—Offered to take Mr. Platt out there, and go over the ground. Shall I go on? Is that an objection?

(Testimony of William Denman.)

Mr. PLATT.—Well, I don't interpose any objection. I don't see any materiality, if the Court please, to any such testimony.

Mr. LEWERS.—Will you proceed and state what, if any, offer was made?

A. I cannot give the exact words of the conversation. I had [420] received notice of the filing of the suit, of the two suits, one involving the Little Rock Creek inclosure, and one involving this, and I shortly came up to see Mr. Platt, because we had an understanding there was going to be a civil settlement of the disputed questions at Little Rock Creek, and I said to him at that time, "Now, Mr. Platt,"—substantially this—"if you and I could go together over those fences at both places"—

The COURT.—Excuse me a moment. Do you claim the Government is bound by this?

Mr. DENMAN.—No, I simply want to show that this trip we took up here is one the Government would have been invited to go on if they had not declared they would not go with us over the ground.

Mr. PLATT.—I submit I am quite willing to take the witness-stand and testify to the best of my recollection what I stated; but I do contend this, if the Court please, that there have been many offers made by the defendant company, and there have been many suggestions made by the Government through its representatives here in Carson, and through its representatives in Washington; and there have been many things occurring, if the Court please, whereby the offers and representations as made by the defend-

(Testimony of William Denman.)

ant were not complied with, and there have been many things occurring, if the Court please, whereby the suggestions made by the Government have not been adopted; and this question of my offering to go over and view the land, and look at the land, might have been a suggestion or offer coming from Mr. Denman or myself. I should have been very glad to have viewed the premises had it been practicable, but I could not do it, I didn't have the opportunity to do it; and I had to rely, and do rely, on the reports of the agents, which the testimony will show, if I [421] am permitted to testify, whether I do so or not makes no difference, but if I am permitted to testify, I will show that not on one occasion, but on two occasions, I ordered the Government's representatives to make a second report on the Squaw Valley inclosure, with a view of reporting to me subsequently.

Mr. LEWERS.—If the Court please, I desire to strike out all of the remarks of Mr. Platt in so far as they contain a statement of what was done, first, on the ground they are not in reply to any question; second, on the ground they are not made by him as a witness, although they are testimonial in their nature; third, on the ground that in so far as they contain statements that suggestions have been made, and that the defendant has not complied with those suggestions, that they are prejudicial to the defendant, and that they bring in a large number of matters which are not involved in the record in this case, and which we cannot meet, consisting merely of as-

(Testimony of William Denman.)

sertions that tend to indicate that we have not acted in good faith.

The COURT.—Now, gentlemen, Mr. Lewers has stated the whole thing. If I take this testimony under consideration, how can I refuse to allow Mr. Platt to go on and state propositions that have been made by the Government, and the way they have been treated?

Mr. DENMAN.—May I answer that question?

The COURT.—Just a moment. And where will the end of it be? And even if I allow it, what effect will it have? If I find it is an illegal inclosure, I must so decide; if I find it is not an unlawful inclosure, I must so decide, irrespective of offers that have been made, or offers that have been rejected.

[422]

Mr. DENMAN.—The only purpose of this testimony is to show in response to a certain line of questions by Mr. Platt to Mr. Sheehan, from which the inference might be drawn, that this was a one-sided trip, on which the other side was not represented: That in the month of June I called on Mr. Platt and offered to go over the premises with him, and he stated on account of the pressure of business, and other things, he could not go; that it was never his practice to go out on cases of this kind, he could not do it, on account of the press of business he had on hand. I made the offer to go over the premises with him, and it is not a one-sided trip.

Mr. LEWERS.—I ask for a ruling to strike the other testimony or statements of Mr. Platt from the

(Testimony of William Denman.)

record. It was not in the nature of an objection.

The COURT.—It may go out. But if this testimony goes in and Mr. Platt wants to go on the stand and testify, I shall permit him to do so.

Mr. LEWERS.—I have withdrawn the question.

Mr. PLATT.—Very few questions have been asked; and I have no objection, because, as I say, I don't consider it relevant at all, that the Court strike out everything from the record from the time that Mr. Sheehan left the witness-stand. I don't think any of it is proper in this record.

Mr. LEWERS.—I would not like to have it all stricken out of the record in that sense, because I moved to strike out, and also excepted to the nature of the statements made by Mr. Platt as prejudicial to the defendant, and that it involved the statement that we had not complied with promises. [423-5]

The COURT.—It will certainly not prejudice this Court, if you want it out. For some subsequent Court, that is another matter. I am perfectly willing to tell you that the extreme statement you make and the extreme statement Mr. Platt makes as to this matter will have no bearing with the Court now.

Mr. PLATT.—I ask that it all be stricken out from the time Mr. Sheehan left the witness-stand, because I don't think it is properly in the record.

The COURT.—Unless there is objection, I will allow it to be done.

Mr. DENMAN.—Well, we will object to the motion, your Honor.

Mr. PLATT.—Then as I understand counsel, you

(Testimony of William Denman.)

oppose the motion, and it all stays in the record?

Mr. DENMAN.—No, it is your motion to strike it all out we are opposed to.

The COURT.—What testimony have you in now?

Mr. LEWERS.—I don't know, except that the record shows we asked certain questions.

The COURT.—There was a statement made by Mr. Denman, which he made in response to my question, and I assume that he was talking then as a lawyer and not as a witness.

Mr. LEWERS.—That was my understanding.

The COURT.—So I don't think there is any testimony in at this time.

Mr. DENMAN.—The testimony that I made the offer to Mr. Platt.

Mr. PLATT.—Well, if that testimony is going to stay in, and your Honor thinks it is proper, I want to cross-examine the witness.

The COURT.—I think, gentlemen, I will strike the whole matter out, and you may have your exception. I would have been very glad to have stricken the whole thing out, objections, exceptions, [426] and the whole matter; but as it is, it is stricken out, and each of you has an exception to that portion of it.

[Testimony of Frank J. Button, for the Defendant.]

FRANK J. BUTTON, a witness called by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. Your name is Frank J. Button, is it not?

A. Yes, sir.

(Testimony of Frank J. Button.)

Q. And you live in Humboldt County, Nevada?

A. Yes.

Q. How long have you lived in the State of Nevada, Mr. Button? A. Since 1873.

Q. And in what portions of the State have you lived? A. In Elko and Humboldt County.

Q. And what is your position at the present time, Mr. Button?

A. General manager for Bliss Brothers.

Q. In what line of business? A. Cattle business.

Q. And where are the properties of the Bliss Brothers in the State of Nevada situated?

A. In Humboldt and Elko County.

Q. And where are they situated, if you know, with reference to the Squaw Valley Ranch of the Golconda Cattle Company?

A. Squaw Valley would be east of our summer range.

Q. And have you ever been in any of the territory covered by the Squaw Valley Ranch? A. Yes, sir.

Q. When were you there?

A. Well, the first time I went there was in 1874; but there was no Squaw Valley Ranch there at that time.

Q. State generally your familiarity with that country since that time? [427]

A. Well, I rode in there, attended rodeos, till 1883, 1882 I think was the last rodeo I attended in that country.

Q. When was the last time that you were in there, about how long ago?

(Testimony of Frank J. Button.)

A. It is a couple of weeks ago, I think, I don't remember the date.

Q. Did you accompany the automobile party that went up there? A. I did.

Q. And were you there at the time Mr. Sheehan was? A. Yes, sir.

Q. Now, I call your attention first to the Government's Exhibit No. 1, representing a portion of the Squaw Valley Ranch; this on the south side representing Willow Creek, that the Willow Creek reservoir, and this red line running along here representing a fence line to a point marked Opening No. 6; then running northerly up to a point, or a black line marked Nelson's fence, and then another fence marked in red, running north, also marked Nelson's fence, then across a point marked Opening No. 5, North's fence to Nelson's fence $1\frac{1}{4}$ miles, then over along what is marked North's fence, then down a creek marked Rock Creek, down to the point where we began. Now, do you understand that plat generally, Mr. Button? A. I do.

Q. I also call your attention to Exhibit "A," another plat, representing a portion of the same territory, beginning down here at what corresponds approximately to the Opening No. 6 there, running north along Siawappe Creek, Nelson's fence, across Opening No. 5 the same way, over to a creek marked on this plat "Toejam Creek," then on down to the junction of another creek, which is not marked. Now, do you understand that plat as compared with this one here,—the lower plat purporting to represent

(Testimony of Frank J. Button.)

only the northeast portion of the upper one?

A. Yes, I think I do. [428]

Q. Now, Mr. Button, on the occasion when you went up there with an automobile party, how far with reference to the reservoir, Willow Creek reservoir, approximately did you go in the automobile?

A. How far?

Q. Before you got off the automobile and took the horses?

A. Well, we just went a ways, about, maybe a quarter of a mile or half a mile above the reservoir.

Q. What sort of a place; will you describe the place where you got off to take the horses?

A. Why, sagebrush there, kind of a flat place where we got off to take the horses; it was at the end of the fence, I think, or where it corners.

Q. Were there any creeks there?

A. Yes; there was a creek I think they called Warm Creek, ran down, a small creek; the Willow Creek is a little further over.

Q. And from there generally, where did you go?

A. Well, we went up Willow Creek a ways, up one side, and crossed over on another side, and went up there to some cottonwoods, I think was the first place we stopped.

Q. And with reference to what I have indicated on the map, Mr. Button, pointed out on the map as Nelson's fence, that being Siawappe Creek running up there, where, approximately, will you indicate were those cottonwoods?

(Testimony of Frank J. Button.)

A. Where is the opening? It was close to the opening.

Q. An opening between what, what fences?

A. Two fences, I think one was Nelson's and the other one was the company's fence.

Q. You mean the Golconda Cattle Company?

A. The Golconda Cattle Company.

Q. I call your attention to a point near Nelson's fence, marked [429] Opening No. A, is that the place that you refer to?

A. Right to where Nelson's fence commences?

Q. Yes. A. Yes, sir.

Q. Now, what did you do when you came to the place where these cottonwood trees are?

A. Well, we got off the horses, and stayed there a while, looked across at the opening and the hills the other side.

Q. By hills the other side where do you mean?

A. Well, it would be east from where we was, I should judge, in that direction, a little north of east.

Q. Now, what did you see there?

A. I see some rolling mountains.

Q. Describe them more fully.

A. Well, there is small rolling mountains that runs through the country there, they are not very high, kind of small mountains.

Q. Now, what was there at this opening, what was the character of the ground there?

The COURT.—Is that Opening No. 5?

Mr. LEWERS.—Opening No. A.

A. Well, it is the same as all the ground mostly

(Testimony of Frank J. Button.)

in the State of Nevada, sagebrush and rocks, some rocks, and sand.

Q. What sort of an opening was it with reference to the ability of cattle to pass through it?

A. Well, I should judge the opening was about 300 feet wide, and sloped off down to a creek, and from there over onto smaller mountains.

Q. Did you observe the ground through that opening, and down toward the creek? A. Yes.

Q. Have you had any experience yourself, personally, in handling cattle? [430]

A. All my life you might say, ever since I was large enough.

Q. And basing your answer on your experience as a cattleman, could cattle get down through that opening, and down into that creek? A. Very easily.

Mr. PLATT.—Of course the same objection, if the Court please, that I have interposed to all of this line of questions.

The COURT.—Yes. The same ruling and same exception.

Q. And what was there in that clump of cottonwoods?

A. Well, there had been some posts cut there some time or other, a good many of them had been cut off I noticed.

Q. Was there any water there?

A. I believe there was a little spring of water there, I am pretty sure there was.

Q. State whether or not that clump of cottonwoods lies to the east or the west of the fence, general fence

(Testimony of Frank J. Button.)

line. A. It would lie to the west.

Q. And the stream you refer to lies, with reference to the fence, at that clump of cottonwoods, to the west or east, which? A. To the east.

Q. And how far, approximately, as near as you can recollect, was that stream from the clump of cottonwoods?

A. Well, I should judge about a half a mile, maybe not quite so far.

Q. And after you were at the point where the cottonwoods were, where did you go, generally?

A. Well, we followed up the end of that fence, I don't know whose fence it is.

Q. What sort of a fence was it?

A. Well, it was a fence of three barb wires, and made out of cottonwood posts.

Q. Referring to the plat again, Mr. Button, is that the fence [431] which is marked in red here on this plat as running north and slightly east from Opening No. A, this being Opening A here?

A. Yes.

Q. And as you went up that fence, did you take any notice of the surrounding country? A. Yes.

Q. In which directions?

A. Well, all directions, looking first one way and then the other.

Q. What were you looking for?

A. Well, I was looking for country, I wasn't looking for rabbits.

Q. And what was your observation of the country lying to the east and northeast, will you describe it,

(Testimony of Frank J. Button.)

that you observed as you went up along that fence?

A. Well, they are low rolling hills for a long ways, and after you look over there for quite a piece, of course I don't know, it would just be guesswork, for about 4 miles, there seemed to be a large mountain in there, a larger mountain.

Q. Did you at any time strike what is known as the North or Noble fence on that trip?

A. Yes, sir.

Q. And in crossing over to that fence, did you on the way over observe the country around you?

A. Yes.

Q. On which side? A. All sides.

Q. And what did you observe as to the character of the country lying to the east and northeast, and the north, as you crossed over there?

A. Well, there is low rolling hills there, about the same, the country there is all pretty near alike.

Q. What was the country to the southwest?

A. Well, there is a mountain or hill that runs down through there for a long ways, rolling hills, quite a number.

Q. In which direction is the general slope of the country there?

A. Which places would the water run?

A. No, taking those rolling hills that you looked at on your [432] right as you went up, and on your left?

A. There is one runs pretty near north and south. Do you mean to the left?

Q. Yes. When you were crossing over from the

(Testimony of Frank J. Button.)

Nelson fence to the Noble fence, and taking the country generally to the north and east, and the country generally to the east and west.

A. I should judge they would generally run east and west.

Q. What would be the general slope of the ridge?

A. Well, the general slope would be east and west.

Q. In which direction from you at that time did you see the highest mountains, is what I want to get?

A. It would be northeast.

Q. Calling your attention to this fence marked Nelson's fence, which you say was built of cottonwood posts, how far up did you follow that fence with reference to that corner?

A. Followed it up to the corner, I think; yes, I know we went up to the corner.

Q. That would be the point marked with an arrow, on the east arrow? Being the point marked as the east end of the arrow, joining the 1¼ mile opening?

A. Yes.

Q. Now, from that point, or the nearest point you came to the Nelson fence, what did you observe as to the character of the country lying east and northeast? A. Well, there was rolling hills.

Q. What would you say as to that country concerning the passage of cattle over it?

A. Cattle can go over it, I drove cattle over it.

Q. When?

A. Well, sometime in the 80's, 70's, along in 1882, I think. I rode most all over that country, and drove cattle most everywhere. [433]

(Testimony of Frank J. Button.)

Q. State whether or not you saw anything there, which from your knowledge of cattle and cattle business, would obstruct the passage of cattle.

Mr. PLATT.—Same objection, I assume that it goes to all this testimony?

The COURT.—Same ruling and same exception.

A. Not anything.

Mr. LEWERS.—(Q.) Referring to Exhibit No. 1, and going to the same point, near the end of the Nelson fence, I call your attention to an object to the north and east of that, appearing from the plat to be approximately a mile away, marked “Toejam Mountain,” and called on the plat a natural barrier. Now, what did you see there, if anything?

A. Why, I see a mountain, or hills, it wasn't very steep, rolling; nothing to prevent cattle from going up that mountain.

Mr. PLATT.—I ask that the last part of the answer be stricken out as not responsive to the question, although I suppose another question will be asked.

The COURT.—I will let that stand.

Mr. PLATT.—If your Honor will give me the benefit of the same exception.

The COURT.—Certainly.

Mr. LEWERS.—(Q.) Did you see anything in the way of rim rock or anything else, shaped like that, or running in that country anywhere like that?

Mr. PLATT.—I object on the ground the question is leading.

(Testimony of Frank J. Button.)

Mr. LEWERS.—Like this Toejam Mountain on Exhibit No. 1?

The COURT.—Read the question.

(The reporter reads the question.)

Mr. LEWERS.—I have already asked what he did see there; now I want to bring out about this specific thing. [434]

The COURT.—I think you can strike out of it about rim-rock, and so on. You are asking him whether there is anything there in the country, that is, similar to what is pointed out to him on the map.

Mr. LEWERS.—I will withdraw the question and reframe it. Q. Mr. Button, is there anything in that country, in the location or vicinity of what is marked on Exhibit No. 1 as Toejam Mountain, like that?

A. I would like to have it explained what you call that?

The COURT.—(Q.) Let me ask you, Mr. Button, is there any ridge running across there from the northwest to the southeast on that?

A. Yes, there is a ridge runs along there; there is mountains all along there, low mountains, some of them is higher than others but from here out, this mountain comes down here, there is a mountain along that.

Q. Does it run along there in the direction of that line on the map, just run your pointer?

A. Well, there is one runs along there something similar to that, but I don't think there is one runs so far as that, that I noticed.

Mr. LEWERS.—(Q.) Describe what it is, de-

(Testimony of Frank J. Button.)

scribe its appearance, its surface.

A. Well, it is quite rocky, and sagebrush on the ground.

Q. How about it for the passage of cattle?

A. All right.

Q. What do you mean by all right?

A. The cattle could go over it easy enough.

Q. Do you know whether they do?

A. No, I could not answer that question, to be sure.

Q. How did it compare with the rest of the country that you have described toward the northeast?

A. I could not see much difference in it. That mountain there was a little bit higher, I should judge, than some that was further back; the further up [435] you go, the higher the mountains get.

Q. Now, I call your attention again, Mr. Button, to Exhibit "A," and to an object or delineation in section 34 of that, lying to the northeast of the point near Nelson's corner that you have referred to, marked there a hill; I will ask you if that represents in any way what you saw?

A. Yes, there is a hill across the creek from there.

Q. When you crossed over from the last point you have described, over to Noble's fence, did you make any examination of that fence?

A. You mean Mr. Noble's fence?

Q. Yes.

A. Well, I think I rode in and out of the fence three or four times, crossed it backwards and forwards going through there, three times, I believe.

Q. Well, will you describe the fence just as fully

(Testimony of Frank J. Button.)

as you can, what you found and observed in connection with it?

A. Well, in the first place, I think we came to, I should judge it was down about 300 feet, it was laid over on the ground, and quite a number,—I noticed the fence had rotted off there, redwood posts through there, and the fence was made out of the old-fashioned black wire we used to use. Then there was, oh, a number of places all along from there down to Toejam, that the fence was down in different places, laid over; laid over on the ground, in some places the posts was rotted off.

Q. From your observation of that fence, or from knowledge that you have, how old would you say it is?

A. Well, it is an old fence; I should judge it was 20 years old, if not older.

Q. What was the appearance of that fence as to whether it had been torn down, or as to whether it had fallen down through decay?

A. Well, the fence, I should say it had fallen down through the posts rotting off. [436]

Q. Now, in crossing over through that territory, from the Nelson fence over to the Noble fence, I will ask you whether or not the ground that you crossed over was of a character that cattle could pass over it?

A. Yes, sir.

Q. Now, do you know, Mr. Button, what the character of the feed in that vicinity is during the summer?

A. Well, what the feed is now and what it used to

(Testimony of Frank J. Button.)

be, I know what it used to be in early days, but since 1883, since I drove in there—

Q. What was it then?

A. In the spring there was some feed there, but it generally dries up early, it does all through this country, in them low foothills.

Q. But I am referring to up around the vicinity of this Nelson fence, and to the north and east thereof.

A. North and east of the Nelson fence?

Q. Yes, higher up.

A. Higher up there is good feed in there, or used to be.

Q. Now, referring to the land lying to the southwest of the point you have last described, indicated on Exhibit No. 1 as the white land, inside of the blue, are you familiar with any of that country in there?

A. Yes, sir.

Q. Have you ever ridden over any of it?

A. Yes, sir.

Q. Now, what is the character of that land down in there as to the feed on it?

A. Well, we never considered it much account only in the spring there is some feed grows there in the spring, it generally dries up early. The higher up you get the better the feed is always, in the mountains.

Q. Now, Mr. Button, what is the natural tendency of cattle in the northern country as to their drift during the summer; that is, where do they drift in fact, is what I want to get at.

Mr. PLATT.—Same objection; and on the further

(Testimony of Frank J. Button.)

ground he has [437] not shown that he knows what the natural tendency is. When I say the same objection, I mean that it is calling for the opinion or conclusion of the witness.

The COURT.—It will be the same ruling and exception.

Mr. PLATT.—And the further objection that he has not shown that he knows the tendency of cattle in that vicinity.

Mr. LEWERS.—Answer the question.

A. I don't know as I exactly understand the question now.

Mr. LEWERS.—I will withdraw it for the time being, and ask another.

Mr. PLATT.—I withdraw the objection.

Mr. LEWERS.—(Q.) Do you know, Mr. Button, the natural trend of cattle during the summer in that northern country?

A. Well, yes, I know what they used to be.

Q. What was it?

A. They used to go up, the cattle used to go up on these low foothills early in the spring, and then work up into the higher hills.

Q. Were you in this country generally before the sheepmen began to come in? A. Yes, sir.

Mr. PLATT.—I object on the ground he has not testified that he knew that any sheepmen ever came in. Counsel is assuming that knowledge on the part of the witness.

Mr. LEWERS.—The Court has taken judicial knowledge of conditions up there, to a very large extent.

(Testimony of Frank J. Button.)

Q. About when, as near as you can fix it approximately, without giving the exact year unless you are able to, did the sheepmen begin to come into this country in the vicinity of Squaw Valley?

A. They used to drive through there in the vicinity, and they never used to stop around the vicinity of there; in the forepart of the 70's there wasn't very many sheep that went in through that country. [438]

Q. When did they begin to stop in there and graze in there, approximately?

A. Well, along in the 80's.

Q. What was your purpose in making that trip around there that day, Mr. Button?

A. To see the country, and as a witness.

Q. And during that trip did you make any particular observations of the country as you went through it? A. I did.

Q. And I will ask you whether or not during that trip there was any discussion between you and others, concerning that country and its character?

A. Some, yes.

Mr. LEWERS.—Take the witness.

Cross-examination.

Mr. PLATT.—(Q.) Who asked you go to go up there? A. Sheriff Lamb.

Q. And were you told that you were wanted to go up there in order that you could testify in the case?

A. Yes, sir.

Q. Was any suggestion made to you by any of the company what you were going to find?

A. There was not.

(Testimony of Frank J. Button.)

Q. Was it said in the party that you would not find any gaps, or any high hills or barriers? A. No.

Q. It was not discussed at all?

A. No, it was not discussed.

Q. You didn't talk about it on the trip at all?

A. Not until after we got on the ground.

Q. When did you begin talking about it?

A. It was the next morning after we rode up through there.

Q. The next morning when you started to go across it? A. Yes, when we started to go.

Q. Was the suggestion made several times that you would not find any inclosure, and would not find any barriers, and that the country was open, and that the Government's suit was inadvisedly brought, and all that thing? [439]

A. Well, not by the gentleman that I went with. I have heard that outside.

Q. You have heard that outside, but it was not mentioned in the crowd at all? A. No.

Q. Do you entertain any prejudice at all against the Government in this matter?

A. None whatever.

Q. You want to testify to things as you saw them, don't you, Mr. Button?

A. That is all I propose to testify to.

Q. That is all you care about? A. Yes.

Q. And you want to testify to what you know to be so, regardless of what your feeling may be?

A. Well, I have got no feeling I assure you, against the Government.

(Testimony of Frank J. Button.)

Q. You are not biased one way or the other, are you? A. No, sir.

Q. Now, you have travelled over this country represented in the white here frequently, haven't you?

A. A good many times.

Q. And you know as a matter of fact, don't you, from the southwest of this so-called inclosure, from the southwest, going in a northeasterly direction, the country begins to get higher and steeper, does it not, all the time? A. Yes.

Q. It is much higher at the northeast end than it is at the southwest end, is it not? A. Certainly.

Q. And when you get up into this section shown on the plat as Toejam Mountain, it begins to get more mountainous than it was down here, does it not?

A. Certainly.

Q. Now, you would call this section represented in the blue, in the northeast, a mountainous section, wouldn't you? A. Yes.

Q. There are higher hills, mountains, around where Toejam Mountain is shown on the plat than there are further down? A. Yes. [440]

Q. As a matter of fact it is much more difficult to travel in that section shown in the northeast corner, than it is further down, is it not?

Mr. DENMAN.—I object to the question. What class of travel, horseback or how?

Mr. PLATT.—I am asking the witness whether or not it is more difficult to travel horseback, a-foot, or in a buggy than it is down in another part of the section? A. Why, of course the steeper it is.

(Testimony of Frank J. Button.)

Q. And it is more difficult to travel because it is steeper up there, is it not?

A. Yes, it is a little steeper.

Q. You could not drive a wagon or buggy through that country, could you? A. I could.

Q. You could? A. Yes, sir.

Q. What would enable you to do it?

A. I have driven wagons over a whole lot steeper country than that.

Q. You have driven over there?

A. Not at that particular point, but I have driven wagons over steeper places than that.

Q. But it was not a natural drive for a wagon, was it? A. No.

Q. It was a difficult drive, wasn't it?

A. Yes, I have taken some pretty difficult drives.

Q. But it is not a place one would ordinarily drive with a wagon, is it?

A. No, you would not have no business up in there with a wagon.

Q. You would not have any business up in here with a wagon, would you?

A. I don't suppose there would be anybody going up there with a wagon.

Q. Unless the man were venturesome, and it was a matter of necessity that he go up there with a wagon, he would not use a wagon in that country?

A. He would not have to be very venturesome to go up there. [441]

Q. Is it not quite steep up here? A. Not very.

Q. You would not call this section up in the white a mountainous section?

(Testimony of Frank J. Button.)

A. No, there is small hills there.

Q. But you would call this section of the country in the northeast quarter a mountainous country?

A. Yes.

Q. Now, why would you call this northeastern part a mountainous section?

A. Because it is higher.

Q. Is that the only reason, just because it is higher?

A. Well, the most of this country below there is a flat.

Q. Oh, I see. Most all this country below is a flat, and this is higher, is it much higher?

A. Well, it is quite a piece higher. You mean from the house up, or where?

Q. Yes, from the house up to this northeastern section. A. Yes, sir, it is quite a piece higher.

Q. And because it is quite a piece higher, you would call this a mountainous section as compared with any of this white within the inclosure, wouldn't you?

A. Yes. Well, no, there is some mountains in lower down—I say after you go up there a ways, before you go up to them high places there is some mountains in there, what I would term a mountain, or hills.

Q. These hills or mountains you say within the white are tending toward the northeast, is that true?

A. Yes, sir.

Q. But these mountains, or hills, or this country in the northeast, would be higher than these mountains or hills upon this land in the white, wouldn't they?

(Testimony of Frank J. Button.)

A. Yes.

Q. I don't want to misunderstand you or misquote your testimony, but you say you would call the north-eastern section a mountainous country, but there would be a few high places within the white you would call mountains?

A. There is quite a number of [442] mountains in it. You might say from the time you leave the dam all the way up there is mountains, and from Rock Creek Corral up there, there is mountains all the way.

Q. Would be mountains all the way from the time you leave the Willow Creek dam, tending up toward the northeast, is that true? A. Yes.

Q. And when you got up to this mountainous section shown in blue on the plat, then you would come to the higher mountains?

A. Yes, the further up you go the higher it is, it is a slope from the dam up.

Q. You never went along the fence line as shown upon the plat here, Mr. Button, until you made this last trip in that automobile, did you? A. Which?

Q. Did you ever make the circle of this fence?

A. No.

Q. Or go there with a view to examine it, before you made this trip in the automobile? A. No.

Q. And of course you don't know anything about the conditions of that fence from any actual knowledge until you made this last trip in the automobile, is that true? A. That is true.

Q. And so far as that North fence about which you testified, you don't know whether the storms of this

(Testimony of Frank J. Button.)

recent winter blew the fence down or whether somebody pulled it down?

A. Well, it looks to me, Mr. Platt, as if—

Q. I know what you—

Mr. DENMAN.—One moment.

Mr. PLATT.—I know what his opinion is, if the Court please, but I am asking him a straight question, calling for his knowledge.

Mr. DENMAN.—Our objection is that counsel interrupted the witness while explaining his answer, and that the witness should be permitted to go on and explain his answer without interruption from counsel. [443]

Mr. PLATT.—The question calls for a categorical answer. I asked whether he knew that the storms of last winter blew the fence down, or whether anyone pulled the fence down.

The COURT.—Well, read the question to the witness; and if you can answer yes or no, do so, then if you want to add anything, you will be permitted to do so.

(The reporter reads the question.)

Mr. PLATT.—(Q.) Now, you don't know that of your own knowledge, do you? A. No.

Q. You were not there? A. No, I was not.

Mr. LEWERS.—The witness started to make an explanation.

Mr. PLATT.—The witness started to give his opinion as to what he knew about it, and it is not testimony.

The COURT.—It seems to me that he did not get a

(Testimony of Frank J. Button.)

chance to answer the first question.

The COURT.—(Q.) Have you any explanation you want to make? Do you want to say anything further? A. Why, I would like to explain.

Q. Very well, explain.

A. Of course I don't know whether the wind blowed it down, or anything else, but the best of my judgment them posts has rotted off, and the fence has fell over, could not say whether they fell over this winter or some other winter, or when they fell over.

Mr. PLATT.—(Q.) You are giving that as your opinion? A. That is my opinion.

Q. Now will you give it as your opinion that the fence fell over this winter? A. No.

Q. Will you give it as your opinion that it did not fall over this winter?

A. Well, I don't believe it fell over this winter.

Q. Why don't you think so? [444]

A. Because it looks as if it had been over there quite a while.

Q. You saw a lot of snow there, didn't you?

A. Some places lot of snow, and some places not.

Q. You don't know as a matter of fact, whether somebody came and pulled the fence down, do you?

A. No.

Q. You could not testify as to that? Do you know how long North's fence is from the intersecting point in section 36 down to where the main fence intersects at what seems to be a section line?

A. This is North's fence (indicates).

Q. No; I mean this portion of the fence which I

(Testimony of Frank J. Button.)

am indicating with my pencil there.

A. Whose fence is that?

Q. It is shown on the plat to be North's fence.

A. Do I know how far it is?

Q. Yes, do you know how long that stretch of fence is?

A. No.

Q. Do you know how much of it was down?

A. Well, it was down in three or four places that I took particular notice; I should judge there was one place about 300 feet that laid over.

Q. Were the wires attached to the posts as the posts were laying upon the ground?

A. There was some of the wires attached to the posts.

Q. Was that in that open place of 300 feet there were wires upon the ground?

A. Yes.

Q. Where did you see any other gaps?

A. Well, I could not exactly tell just exactly the spots, I know I rode backwards and forwards through the fence twice.

Q. Were they large openings, aside from this 300 feet opening?

A. Oh, there was openings there, I would judge a couple of hundred feet.

Q. How far apart were they?

A. The openings?

Q. Yes. [445]

A. That I could not say, not a great distance apart.

Q. They were pretty close together, were they?

A. Well, some of them was.

Q. Were the wires upon the ground where those were open too?

(Testimony of Frank J. Button.)

A. The wires was upon the ground all except in one place; there was one place after you get pretty well down onto Toejam, the wires had been cut there, somebody or other, and throwed back against the posts.

Q. Did the wire look as if it had been cut?

A. Yes.

Q. You don't think there was a natural break in the wire, do you? A. Oh, no.

Q. You give it as your opinion that somebody cut the wire? A. Yes.

Q. Do you know in how many places the wire was cut?

A. Well, there was three wires, cut in three places; each wire was cut close to the post.

Q. And turned back?

A. They was turned back, yes, sir.

Q. How big an opening did that make, do you know? A. Oh, 50 or 60 feet, I think, about that.

Q. And of course you don't know who cut the wires? A. Oh, no.

Q. Or when they were cut? A. No.

Q. As I understand it, you don't know anything about the condition of the land as to feed and grasses, and so on, within this inclosure represented in the white, since the early 80's?

A. Well, I could see what feed there was when I went through there this time.

Q. Of course, you went through in February, didn't you? A. Yes.

Q. Last month? A. Last month.

(Testimony of Frank J. Button.)

Q. And you would not expect to find much feed then, would you? [446]

A. Well, if there had not been any stock in there I would expect to find some feed, not very much.

Q. When are the real feeding seasons?

A. Up in, sometimes it starts in the first of May, there is pretty fair feed, May and June, the low foot-hills, the feed generally dries up sometime in June.

Q. Well, have you any intimate knowledge at all as to what feeding was done within this inclosure after the early 80's, and up to the present time?

A. Not after 1883.

Q. And during the 80's you say, as I understood, there were a few months in the year these lands were used for feeding?

A. Yes, the cattle drifted up through there, but they generally run over the hills on Fraser Creek, in that way, there never was very many cattle in the flats in the early days.

Q. Not in early days? A. No.

Q. But you have seen cattle grazing within that so-called inclosure in early days, haven't you?

A. Yes.

Q. And I also understood you to say, Mr. Button, that sheepmen grazed their sheep in there in the early 80's?

Mr. LEWERS.—No, you misunderstood. It was as to when sheepmen began to come into the country generally.

Mr. PLATT.—I don't want to misunderstand you. You say sheepmen began to come into the country

(Testimony of Frank J. Button.)

generally in the early 80's?

A. In 1882 there was a couple of bunches of sheep on Fraser Creek, they was there when we rodeoed in the spring; and it might have been along in 1879 that I see a bunch of sheep in there; it is quite a while ago to remember.

Q. But your recollection is as early as 1879 you saw sheep in this white?

A. No, you misunderstand me; over on Fraser Creek.

Q. But you personally have never seen any sheep within this inclosure? [447]

A. I have seen sheep drove along that road, along the Squaw Valley road.

Q. You mean the road indicated upon the plat beginning at Opening No. 1, running a diagonal line going easterly?

A. No, it would run on the west side of the Squaw Valley field most of the way.

Q. On the west of this plat? A. Yes.

Q. Then you cannot testify as to having seen any sheep within that inclosure, at all, can you?

A. No.

Q. What is the condition of the country just on the outside rim of the north side of this inclosure?

A. Why, it is a flat country through there for quite a ways, with sagebrush, just about the same as all through the State of Nevada, sagebrush; there is a little feed grows in among the sagebrush.

Q. But it is generally a flat country, is it, along there?

(Testimony of Frank J. Button.)

A. Well, yes, there is a flat country up there for a ways, until you strike the hills; it is several miles, I think, over to the hills.

Q. What is the general condition of the country outside of the northwest border of this plat, or this so-called inclosure?

A. Well, that was what I was talking about, from the north or northwest.

Q. And from the northwest you say it is a flat country? A. Yes.

Q. How is it directly north?

A. Well, you strike the mountains there; there is a big range of mountains all through that country.

Q. As a matter of fact, don't you begin to strike the mountains when you get toward the neighborhood of Toejam Mountain?

A. Yes, right where Toejam comes in. [448]

Q. Now, about where does Toejam Mountain come in?

A. I am not talking about the mountain; creek.

Q. Oh, creek? A. Yes.

Q. Where does Toejam Creek come in?

A. Comes in just above the corral there on Rock Creek.

Q. Can you indicate how far from the intersection of North's fence the Toejam Creek begins?

A. The north end?

Q. No, North's fence. A. North's fence?

Q. Yes; how far to the west of North's fence does the Toejam Creek begin—well, I withdraw that. Can you indicate upon the plat where the mountain-

(Testimony of Frank J. Button.)

ous country begins to the north? A. Yes.

Q. Well, I wish you would do that, Mr. Button?

A. If you will show me the corral.

Q. The corral is not indicated upon the plat, but here is Rock Creek running up in a northeasterly direction (indicates).

A. Now, where is Toejam?

Mr. LEWERS.—There is Toejam and there is Rock Creek.

Mr. PLATT.—Toejam is not indicated in so many words on the plat.

A. Well, this is where Toejam Creek comes in; I could not say how far it is up here, but when you get up here to about where Toejam Creek comes in, where there is a corral there—it is 12 miles from the house up to where the steep mountains commence.

Q. Twelve miles? A. Yes.

Q. Do those steep mountains commence, do you mean, 12 miles toward the east, or 12 miles toward the north?

A. Twelve miles from the south. From the Dutton house up to Rock Creek corral.

Q. In what direction?

A. Well, it would be northeast from there. [449]

Q. Northeast?

A. I should judge, pretty near north.

Q. Pretty near north?

A. The house would be, I should judge; of course, I could not be accurate.

Q. Well, there is no mistake about this mountainous country beginning from Toejam Creek, is there?

(Testimony of Frank J. Button.)

A. No, the mountains commence to get higher, the hills.

Q. As they advance along to where Toejam Mountain is, they reach their extreme height, don't they?

Mr. LEWERS.—We object; there is no testimony there is any such thing as Toejam Mountain.

Mr. PLATT.—Well, it is called Toejam Mountain, if the Court please, and has been called it all through the trial.

Mr. LEWERS.—There is something on this plat called Toejam Mountain that no witness except Flocker has ever seen.

Mr. PLATT.—(Q.) Did you ever hear of Toejam Mountain, Mr. Button? A. Never did.

Q. Have you ever heard of Toejam Creek?

A. Quite often.

Q. Have you heard of the Toejam Mountains?

A. No.

Q. What is the name of these mountains about which you just testified?

A. We always called them the Rock Creek mountains.

Q. Call them the Rock Creek mountains?

A. Yes.

Q. Now, what is the condition of the country just to the south of this fence line, I mean of the south side fence line?

The COURT.—South of Willow Creek.

A. What do you mean, down from the house?

Mr. PLATT.—No, I mean all along Willow Creek here, down south from it, all along the line of this

(Testimony of Frank J. Button.)

fence; what is the general condition of that country?

A. Well, it is a flat country for quite a ways through there, and then it comes up into the mountains.

Q. Does it come up into the mountains the further south you go [450] or further north you go?

A. Either way you go you would come into the mountains.

Q. How long a distance from Willow Creek itself is the country flat, going south?

Mr. DENMAN.—Whereabouts on Willow Creek?

WITNESS.—I would like to know from what point on Willow Creek.

Mr. PLATT.—Well, the general condition of the country all along south of Willow Creek?

A. Willow Creek runs for a long ways, it is a long creek; if I remember right, it runs down into a lake there; it used in early days; then it runs away up in the mountains, away up past the reservoir for a number of miles.

Q. Mr. Button, would it be very difficult for anybody to herd cattle or graze sheep across the country south of Willow Creek, so as to get up to Willow Creek?

Mr. DENMAN.—Object to that as not proper cross-examination, your Honor.

Mr. PLATT.—If the Court please, one of the first questions asked this witness was as to whether he did not make this trip for the purpose of looking at the country, and he said that he did.

The COURT.—I understand, Mr. Platt, and I

(Testimony of Frank J. Button.)

would like to hear that myself, but the question is whether that is strictly within the limits of cross-examination. As I understand, he commenced his examination above the reservoir at Opening No. 6, and then went up along the east boundary of this territory to the end of North's fence and down to where Toejam comes into Rock Creek. I don't remember any direct examination that they went over any other territory.

Mr. PLATT.—(Q.) Now, Mr. Button, you said, didn't you, in direct examination, that you made this trip for the purpose of [451] looking at that country, and that you did look at the country and examine it? A. Yes.

Q. That is what you were instructed to do, was it not?

Mr. DENMAN.—What country do you refer to, Mr. Platt?

Mr. PLATT.—The country all around the fence, you indicated upon the plat. Do I understand you right?

A. I don't know whether I understand you right or not.

Q. Were you instructed to examine all the country around near or in the neighborhood of this fence shown upon the plat?

A. Well, I was not instructed to do anything.

Q. Oh, you were not? A. No.

Q. You say Sheriff Lamb told you to go, didn't he?

A. Asked me if I would go.

Q. What did he say to you?

(Testimony of Frank J. Button.)

A. He said he would like to have me go up there as a witness for Mr. Kent; he said there was lots of fellows that would like to go, but he said he wanted some good, reliable man that would go up there and look the situation over. I thanked him very kindly for getting the job.

Q. What situation did he explain to you to look over?

A. He said the Government had sued Mr. Kent for fencing land.

Q. And you went to look over the fence, didn't you, and the conditions surrounding the fence?

A. I went to look over the fence; I suppose that is what I went there for.

Q. Didn't you look at this country south of there?

Mr. DENMAN.—Object to the question as not cross-examination.

Mr. PLATT.—I will take the Court's ruling; I want to get it out of this witness, if I can.

The COURT.—If they object, I cannot allow you to go over any other territory than they described during direct examination; and that I think was between Opening No. 6 and the junction of Rock Creek and Toejam Creek. [452]

Mr. LEWERS.—Going up there on a hurried trip in an automobile, naturally he could not examine that country, and we did not examine him on it, because the purpose, as is obvious from the testimony, was to get that upper end.

Mr. PLATT.—(Q.) It was a hurried trip, was it not, Mr. Button? As a matter of fact, you left some-

(Testimony of Frank J. Button.)

where about Opening No. 1 at about 8 o'clock in the morning, and you started your return trip, didn't you somewhere around about half-past one the same afternoon?

A. I think it was about 7 o'clock, maybe it was a little earlier.

Q. And you started to leave there about 1:30 in the afternoon, didn't you?

Mr. DENMAN.—Leave where?

Mr. PLATT.—Leave the inclosure to start back.

Mr. LEWERS.—We object on the ground it is too vague and indefinite; there is no inclosure identified, and even if there were it would not show what part of it.

Mr. PLATT.—(Q.) You finished examining what you went for, didn't you, at 1:30 in the afternoon?

A. Well, they did not tell me I was through.

Q. When did you get through making your observations so you could come here to testify, Mr. Button; I want to know the fact, that is all?

A. Well, *where* we ate our lunch and started for Golconda, I think it was 2 o'clock.

Q. Where did you eat your lunch?

A. Where there used to be an old corral on Rock Creek; there is a sheep corral there now.

Q. And after you had eaten your lunch and started for Golconda, it was only 2 o'clock?

A. I think that was the time, might have been a little later.

Mr. PLATT.—That is all. [453]

Mr. LEWERS.—(Q.) And that was about what

(Testimony of Frank J. Button.)

distance above Dutton Ranch at that time?

A. Twelve miles, I think they call it.

Q. Now, you say that when you were in there in early days there was very little grazing on that interior portion represented on this plat here, is that correct? A. That is correct.

Q. Why?

A. Well, there was more feed everywhere for the stock to get.

Mr. LEWERS.—That is all.

(Court adjourned until Monday, March 11th, 1912, at 10 A. M.) [454]

Monday, March 11th, 1912, 10 A. M.

Mr. DENMAN.—If the Court please, two or three days ago, we made a demand on the Government for the first map made by Mr. Flocker, in their possession. Can you let us have it, Mr. Platt?

Mr. PLATT.—Well, I have not made an examination to see whether I have it or not, but I will to-day.

Mr. DENMAN.—We want it before we close our case. It is the map you showed me last June. I am referring to the map you showed me in our negotiations of last June, the 9th or 10th.

[**Testimony of R. E. Tilden, for the Defendant.**]

R. E. TILDEN, direct examination resumed.

Mr. LEWERS.—(Q.) Taking up your examination about the point where we left, Mr. Tilden, will you state generally how many times you have been in the vicinity of the eastern and northeastern part of the territory represented on Exhibits 1 and "A"?

A. Up there twice.

(Testimony of R. E. Tilden.)

Q. And did you make any survey of any of that territory on the first occasion when you were up there? A. I did.

Q. Now, when was that, Mr. Tilden?

A. The latter portion of November, 1911.

Q. And the second occasion, as I understand it, was when you went up there with Mr. Lamb, Mr. Button, Mr. Sheehan, myself and Mr. Petrie, is that correct? A. Yes, sir.

Q. Did you on any of those occasions make any surveys or observations for the purpose of determining the elevations of the ground in that vicinity?

A. I did.

Mr. PLATT.—If the Court please, I desire to state to your Honor and to caution counsel, that I am going to object to leading [455] questions, if counsel persists in asking them.

Mr. LEWERS.—(Q.) Just state what you did in reference to elevations.

A. Well, during the survey I took distance, course and elevation of the ground from a point at the lane below the reservoir easterly and northerly up Willow Creek and Siawappe, up to the arrow there shown at Opening No. 5, and on up Toejam Creek.

Q. Now, Mr. Tilden, will you step down and indicate on the plat, either exhibit 1 or "A," just where you took those elevations.

A. If this little creek is drawn correctly—

Q. Which little creek?

A. This little branch right in here.

The COURT.—That is Hot Creek?

(Testimony of R. E. Tilden.)

A. No, sir; that is kind of a warm spring coming out of the mountains there.

Mr. DENMAN.—That is Hot Creek, then?

A. No, this is Hot Creek here; this is just a little spring there on this map; it is in the west half of section 28, township 39 north, range 48 east. (Exhibit No. 1.)

Q. Now, proceed.

A. This is the end of a lane, passing through this country; thence in an easterly direction around the south side of the reservoir, on up Willow Creek and Siawappe Creek, and passing Nelson's fence, on up to what is called the summit or Opening No. 5; thence in a northeasterly direction up Toejam.

Q. Now, did you keep any record of your observations as to elevations? A. I did.

Q. Have you that record with you?

A. My field-book on the desk.

Q. Will you kindly produce it? Now, what is that book that you hold in your hand?

A. It is a field-note book for copying notes in, and book No. 9. [456]

Q. When were the entries in the book made?

A. The first entry is November 23d, 1911, Friday.

Q. Was it made at that time?

A. Yes, sir; the notes were.

Q. What I want to get at, Mr. Tilden, is whether or not that book contains the record that you made as you were making this survey? A. It does.

Mr. PLATT.—If the Court please, I object to the question on the ground it is leading. As I under-

(Testimony of R. E. Tilden.)

stand, the survey was made on the 11th day of November, 1911.

WITNESS.—Beg pardon, the 23d.

Mr. PLATT.—If he made the survey on the 23d, and the notes were made on the 23d; those are facts to which the witness may testify.

Mr. LEWERS.—I withdraw the question if counsel objects. I was trying to shorten the examination.

Q. When were the other entries made in that book?

A. They were made continuously on, day after day.

Q. During what time?

A. November,—I can give you the dates starting and ending. From November 23d to December 2d.

Q. And where were you when you made those entries?

A. On the Willow Creek, Siawappe and Toejam Creek.

Q. When were those entries made with reference to the time you were making this survey you have testified to? A. When were they made?

Q. Yes.

A. Made during the progress of the survey.

Q. Now, Mr. Tilden, will you state, beginning at the point you have indicated at the lane below the reservoir, and following up as far as you took your elevations, what those were?

A. The elevations?

Q. Yes.

A. Well, to start with, we assume an elevation, not knowing the sea-level elevation, at the township corner, [457] about half a mile north of Dutton

(Testimony of R. E. Tilden.)

postoffice, as 200, and from this assumed elevation all the rest of the elevations are based upon it. The elevation at the beginning of the lane just below the reservoir, that small creek there, is 364.9, or call it 365 feet.

Q. That is on the basis of this assumed elevation of 200 at the township corner, is it? A. Yes.

Q. Proceed.

A. Where do you want the next one?

Q. Just as you went along following up the creek.

A. There is quite a number of them.

Q. What was the elevation at Opening No. 6?

A. I have *not it* worked out right at the corner, but I have it worked out on the ridge above, the bench above it, it would be half a mile south of that little mesa on top; I have not the elevation worked out at the creek.

Q. Where is this bench, will you indicate on the map?

A. Along in here some place (indicates).

Q. "Along in here some place" don't mean anything; indicate by section.

A. In the south half of section 31.

The COURT.—That would be about half a mile from opening No. 6?

A. I should think it would be a little less than half a mile south.

Mr. LEWERS.—(Q.) What was the elevation?

A. 524.

Q. Now, in order that the record may be clear, how much higher was that than your starting point?

(Testimony of R. E. Tilden.)

A. 159.

Q. You mean 159 higher than the lane?

A. Than the beginning of the lane, or west end.

Q. Did you take any elevation anywhere near the east opening or east end of Opening No. 6?

A. Of the end of Opening No. 6?

Q. Yes. [458]

The COURT.—I thought that was the one he had just given?

Mr. LEWERS.—The one he just gave was south of the opening?

A. Yes, sir.

Q. Where? Will you describe the point, and describe it so the record will show it?

A. About, it seems to me to be about on a scale of 500 feet, southeast of the corner.

Q. Of what corner?

A. Of the east side of the opening, that would be in the northwest quarter of section 32.

Q. And what was that elevation? A. 527.

Mr. PLATT.—If the Court please, I don't want to cross-examine the witness upon this particular question, and I suggest to counsel that I would like to know how near the opening itself that elevation was taken, in order that I may get as nearly as possible the exact location of it?

The COURT.—Five hundred feet southeast.

Mr. PLATT.—From the opening itself?

Mr. LEWERS.—From the east end.

Q. From the east end of the opening?

A. Yes, sir; that is as near as I can get at it.

(Testimony of R. E. Tilden.)

Q. Now, Mr. Tilden, going north from there, and calling your attention to section 20, did you take any elevation in there? A. I did.

Q. At what point?

A. On top of the highest portion of the ridge in there, near where the fence crossed the ridge and went down into the valley.

Q. And what was that elevation? A. 895.

Q. And will you describe briefly what is there at the point where you took that elevation?

A. The fence line.

Q. Well, I mean so far as the natural configuration of the ground is concerned? [459]

A. A few rocks, sagebrush, very little grass; it is a rolling country similar to the east.

Q. State whether or not you took that elevation in a hollow or hill, or where, is what I want?

A. On a ridge.

Q. And with reference to the surrounding country immediately adjacent to the point where you took that elevation, how does it compare in height?

A. Much higher.

Q. Did you take any other elevation near that to the north or to the south, right close to it?

A. One to the northeast in the valley.

Q. Will you indicate on the map just where that was? A. Right about here (indicating).

Q. Where is "about here," describe?

A. It is near the quarter corner between 17 and 20, township 39 north, range 49 east.

Q. What was that elevation?

(Testimony of R. E. Tilden.)

A. 664, bottom of the valley.

Q. Now, going farther north to what is denominated on the exhibit as Opening No. A, did you take any elevation near that point? A. I did.

Q. And how near it?

A. I had one right in the opening.

Q. Well, what is that elevation? A. 821.

Q. Now, going north from Opening No. A, did you take any further elevation? A. I did.

Q. Will you indicate where you took those, describing so the record will show?

A. Northeast quarter of section 8, township 39 north, range 49 east.

Q. And what was that elevation? A. 1023.

Q. Now, will you indicate on the map where that was? A. On the top of the highest portion.

Q. Describe what it was. [460]

A. On the top of a ridge, the top of the highest ridge in that vicinity.

Q. Then where did you take the next elevation?

A. 36.

Q. What do you mean by 36?

A. I mean northwest quarter of section 4.

Q. Now, referring to exhibit "A," is the point marked on exhibit "A" where you took that next elevation? A. It is.

Q. How is it marked?

A. By a square with a dot in the middle, marked 36 in figures.

Q. What does that 36 mean?

A. The number of a station.

(Testimony of R. E. Tilden.)

Q. Number of your survey station?

A. Survey station.

Q. And what was the elevation there?

A. 1320.

Q. And where was your next elevation?

A. At 37, marked by a similar symbol.

Q. On exhibit "A"? A. On exhibit "A."

Q. And what was that elevation? A. 1198.

Q. And where was your next station?

A. At a similar symbol as stated before, marked

38.

Q. Is it where I have my pointer?

A. Yes, sir, northeast quarter of section 32, township 40 north, range 49 east.

Q. And what was the elevation there? A. 1273.

Q. And where was your next station? A. At 39.

Q. Where is 39?

A. On the side of the left top bank of Toejam Creek, down below the top of the bank, northeast quarter of section 32, township 40 north, range 49 east.

Q. What was that elevation?

A. Station 39, 1240.

Q. And where was your next station?

A. At a similar symbol just beyond the fence line.

Q. What fence line?

A. What is called North's fence or Noble's fence, northeast quarter of section 32 near the bottom of Toejam Creek, marked by number 40. [461]

Q. And what was that elevation? A. 1128.

Q. And where was your next station?

(Testimony of R. E. Tilden.)

A. Well, we had several stations along between 40 and the branch going up this way.

Q. What do you mean by "branch going up this way"?

A. It is an elevation.

Q. Well, is it represented on the map?

A. It is.

Q. At what point?

A. At the southeast quarter of this section, section 28.

Q. What is the number of that station on Exhibit "A"?

A. 46-B.

Q. And what is that elevation?

A. That would be 1324.

Q. Now, calling your attention again to exhibit "A," did you take any elevations in that vicinity?

A. I did on the top of a hill.

Q. Where is that hill?

A. Five thousand four hundred feet northeast of station 37 shown on map.

Q. And where is station 37 on map?

A. Southeast quarter of section 32, township 40 north, range 49 east.

Q. Will you take the pointer and indicate where station 37 is; and is the hill which you have referred to represented on that map?

A. It is on exhibit "A."

Q. And how is it marked?

A. By an irregular line with hatches deviating from it in a southerly, westerly and northerly direction.

Q. Is it marked in any other way by any symbol?

A. By a cross and the word "hill."

(Testimony of R. E. Tilden.)

Q. Now, what is the elevation of that point marked on that hill?

A. Two thousand and forty-seven feet, with reference to the other elevations.

Q. Now, will you describe that hill?

Mr. PLATT.—Will your Honor permit me again, in order that I may get this? Will you state again just where your elevation reached 5,400 feet? [462]

A. This mark as shown there with the cross on it.

The COURT.—(Q.) Is that the elevation?

A. That is the point which marks the elevation.

Mr. LEWERS.—(Q.) What is that elevation?

A. The elevation in numbers?

Q. Yes. A. Two thousand and forty-seven feet.

Mr. PLATT.—(Q.) Didn't you testify as to an elevation on top of a hill somewhere, 5,400 feet?

A. Distance.

The COURT.—It was 5,400 feet distance from that point.

A. In that northeasterly direction.

Q. And 5,400 feet distant from what?

A. From station 37.

Mr. LEWERS.—(Q.) State the elevation of that hill again, so there will be no question about it.

A. The top of the hill was 2,047 feet.

Q. Now proceed and describe that hill as far as you can, giving its dimension, appearance, course, and whatever you may have noticed about it.

A. The west end of the hill, the real top of the hill, I should say it is about 2,000 feet north and south, maybe not that much, maybe it is less, I never took

(Testimony of R. E. Tilden.)

real actual measurements, and the hill extends in a northeasterly direction, sloping southerly, westerly and northerly.

Q. Extends in what direction?

A. Extending in a northeasterly direction, shown in the way I point; it is the end of a ridge, what it really is.

Q. With reference to Toejam Creek how does that hill run? A. In a northeasterly direction.

Q. Well, with reference to Toejam Creek how does it run? A. On the south side of it.

Q. Does it run at right angles, parallel, or how?

A. Parallel.

Q. And will you describe as fully as possible the character of [463] the ground to the north of that hill, between it and Toejam Creek?

A. Having a slope from the mountain gradually down to the Toejam Creek on a grade of about 17 per cent.

Q. Upon what do you base that statement, that it has a grade of about 14 per cent?

A. Actual observation and calculation.

Q. What is the starting point of your grade?

A. An elevation in the southeast quarter of section 38.

Q. On Toejam Creek?

A. On Toejam Creek, at the top of the left bank, not the bottom of the bank.

Q. Where was the other end of that grade on the hill? A. On the top of it.

Q. And what was the grade, if you know, from the

(Testimony of R. E. Tilden.)

bank of Toejam Creek to the base of that hill?

A. I don't know, I should think it would be very much less than 17, because I took the highest width of the hill.

Mr. PLATT.—(Q.) Well, did you take it?

A. I did not.

Q. Then you don't know.

A. It is bound to be less than 17, because it is lower down.

Q. Now, will you describe the ground to the south of that hill down toward what is marked on exhibit "A" as "North Fork"?

A. It has a slope slightly steeper than towards Toejam.

Q. And what grade is that?

A. Twenty per cent, or a rise of 20 feet in a hundred.

Q. And was that taken from the same point on top of the hill?

A. Same point, to point near corner of Nelson's fence shown on exhibit "A" near the south quarter corner of section 33.

Q. Now, you have described the grade both to the north and to the south of the hill; will you describe more fully the character of the ground, as to its surface features?

A. On the south side of the hill there is a small ravine running up from Nelson's fence, up towards the top of the hill, up and [464] down.

Q. What do you mean by up and down?

A. Undulating.

(Testimony of R. E. Tilden.)

Q. How on the north side?

A. On the north side is the same character, except the ravines have a more rounding slope on the bottom, and the top of the ridges have a more rounding slope, as well as to say it is a more rounding country.

Q. On the northerly?

A. On the northerly side.

Q. Did you notice anything else concerning the surface of the ground on either side, if so, describe it?

A. Well, it is sagebrush, a few stones around there, rocks or blow-outs, or whatever you might call them.

Q. Describe those, how extensive are they?

A. I should not think some of them more than 10 feet high and 25 feet across.

Q. And how frequently do they occur?

A. I don't think they occur very often. I saw one just a little above this southeast quarter of section 28, up the stream.

Q. Near what station? A. Near station 46.

Q. Now, Mr. Tilden, will you describe the character of the ground in what is marked as Opening

No. 5? A. From what point?

Q. From the two arrow points right across.

A. Well, it is a slightly rolling country; there is a ridge or a table-land right in here.

Q. Right in where?

A. In the north half of section 5, and from this point towards the east quarter corner of section 32, it is a depression, or going down, and the grade would be about, well, give it its extreme limit, 4 per cent.

Q. Well, go on and describe right up through that

(Testimony of R. E. Tilden.)

opening, clear up to the hill.

A. From this point on around in a northeasterly direction up Toejam, to a point opposite the east quarter corner of section 28, it is undulating country, easy of access, [465] both driving cattle or riding.

Q. What is the grade up through there?

A. I should think it would be not over 5 per cent or 6 per cent.

Q. You mean 5 feet in 100 by that, do you?

A. Five feet in 100 or 6 feet in 100.

Q. Now, taking a point in Opening No. 5, midway between the two arrows, or in that vicinity, what would you say is the grade from there to the left, or to the bank of Toejam Creek, up near station 46, or in that vicinity?

A. From this point, not over 5 per cent, I should think.

Q. And taking that same point midway in that opening marked on the plat as $1\frac{1}{4}$ miles, and going easterly to the south side of the hill in section 34, what is the grade there?

A. How near the fence, you can get any grade you want in there.

Q. Well, say along the Nelson fence, first close to the fence. A. Well, 6 per cent.

Q. And what would be the grade there from the same point up to a line right below the base of that hill, on the south side?

A. About 12 or 14 per cent.

The COURT.—(Q.) That is from the middle of 5 to the base of the hill on the south side?

(Testimony of R. E. Tilden.)

A. Yes, sir.

Q. Twelve or 14 per cent? A. Yes, sir.

Mr. LEWERS.—(Q.) And what would be the grade from that same point to the base of the hill on the north side?

A. I could not see around that side so I never took any.

Q. Well, could you see any portion of that north side? A. No.

Q. Why?

A. I was too low, this point was much lower than this, it was sloping down, you know.

Q. Now, I call your attention to exhibit 1, to a long irregular symbol, labelled "Toejam Mountain," and marked on the legend as [466] "Natural Barrier," and running from the northeast corner of the quarter of section 32, down through section 33, and through the southwest quarter of section 34, down to what is marked the "North Fork," did you see that object? A. Did I see that object?

Q. Yes. A. I did not.

Q. Is it there? A. I never saw any.

Q. Well, the question is, is it there?

A. I should not think it was when I never saw it.

Q. Describe that ground.

Mr. PLATT.—I ask that the answer be stricken out on the ground it is not responsive to the question.

The COURT.—Oh, I will allow the answer to stand.

Mr. PLATT.—Exception, if the Court please, on the grounds stated.

(Testimony of R. E. Tilden.)

The COURT.—Let the exception be entered.

Mr. LEWERS.—(Q.) Now, Mr. Tilden, calling your attention to the beginning of that so-called Toejam Mountain barrier in section 32, will you, beginning at that point, and going clear through that alleged barrier, describe the ground where it is represented to be on the map?

A. From this point on the hill near the west quarter corner of section 34 to the end of this so-called Toejam Mountain, it is—

Q. Which end?

A. To the west end of Toejam Mountain, situated in the northeast quarter of section 32, it is a slightly sloping ground on a grade of about 15 per cent.

Q. Describe the surface of the ground, what it is like, just as fully as you can.

A. Well, it has small ravines, an easy slope, easy of access, ride a horse up it very easy, or ride a horse north and south or east and west, up that portion.
[467]

Q. Well, describe it as to rock, or anything that is there.

A. Sagebrush; I never saw any rocks in there at all.

Q. Anything besides sagebrush?

A. Sagebrush and undulating ground.

Q. For how long a distance does that undulating ground extend? A. Which way, westerly?

Q. In any direction.

A. A mile; from this portion to the west it is a

(Testimony of R. E. Tilden.)

mile, and as you go along it would be 12 miles.

Q. In what direction?

A. Southwesterly direction.

Q. How about east and northeast?

A. I never went in the easterly portion, but in the northeasterly portion it is undulating, easy of access.

Q. How wide is that strip north of the hill, and between the hill and Toejam Creek?

A. About three-quarters of a mile.

Q. Now, going south on this alleged barrier from the hill that you have marked on exhibit "A," describe that ground down to the North Fork.

A. Well, I personally never entered that country, but my rodman did.

Q. Describe what you saw.

A. The same country as I saw through here, intercepted with ravines, small ravines, undulating country.

Q. How close were you to it?

A. Station 37 and 36.

Q. And from where you were at those stations, could you see that ground?

A. Yes, sir, very well, beside better with the instrument.

Q. Did you examine it with the instrument?

A. I did.

Q. State what its surface was, as you looked along it with the instrument from the position where you were.

A. An undulating country, interspersed with ravines, easy of access, covered with sagebrush.

(Testimony of R. E. Tilden.)

Q. Mr. Tilden, what is the character of the ground in the east half of section 33, immediately to the west of what you have marked as a hill?

A. A very easy slope, some places, and level at the bottom of the draw.

Q. Describe what you saw or what there is there in the way of rock of any kind, before you reach that hill, or on either side where that barrier is purported to be.

A. From what point?

Q. I don't care what point you observed it from; but what is there along where that barrier is alleged to be in the way of rocks?

A. There is a small rocky hill about 15 feet high near point marked station 38, situated in the north-west quarter of section 33, a few small outcrops of rocks.

Q. Describe it fully.

A. Covered with sage; that is about all I can say for it, undulating.

Q. Well, how big is it?

A. About 10 feet high, maybe 15 feet across.

Q. How far does it extend toward the southeast?

A. Well, it did not run southeast, it runs north-east and southwest, I suppose 30 feet. There is also between 37 and 38 another small outcrop, situated near the east quarter corner of section 32.

Q. What is that, describe it?

A. I suppose that is similar to the one I have just described, it is a round outcrop of rocks.

Q. How big?

A. I suppose 30 feet on top, and maybe you might

(Testimony of R. E. Tilden.)

call it 30 feet in diameter.

Q. What is the distance between those two?

A. Easy of access all around.

Q. Well, how far is it from the other outcrop you described just a moment ago?

A. Not over 600 feet or 800 feet.

Q. What is in between them? A. A low valley.

[469]

Q. Now, going right straight across, and confining your attention to the territory covered by these dotted lines, labelled "Toejam Mountain," as shown on exhibit No. 1, describe that surface just as you followed right across, beginning at the west end of that left barrier, and going down to the other end, as to the rocks there, what is there?

A. The real actual position, as shown on this map, would be right up a little low valley; that would be a little low valley running up here.

Q. That is where that Toejam Mountain is represented on exhibit 1, do you mean?

A. Yes, sir, which would be the same thing as on exhibit "A."

Q. And you say that is what?

A. Right up a little low valley. Of course I took elevations along that valley for the purpose of seeing if a canal could be brought over from Toejam to Siawappe.

Q. Now, what is beyond that valley?

A. Undulating country, in a northeasterly direction.

Q. I mean the very first thing you come to on the

(Testimony of R. E. Tilden.)

other side of that valley, describe it, what is it?

A. A slight rise, about 5 or 6 per cent, running in a northeasterly direction, undulating country covered with sagebrush, sagebrush and rocks occasionally.

Q. What kind of rocks?

A. Some of them are granite and porphyry.

Q. I don't care for the material. How are they built in there?

A. They are small blow-outs, sometimes 300 or 400 feet apart, or 500 feet apart.

Q. And how large were they?

A. Oh, 10 feet in diameter; that would not mean 10 feet all solid rock, 10 feet of rock points.

Q. And how high?

A. Five or six feet high. [470]

Q. What is in between them?

A. Sagebrush, undulating country.

Q. What kind of ground, without reference to what is growing on it, what is in between them?

A. Just the ordinary ground, as one would strike along in this country, the southwesterly country.

Q. Could you pass through it? A. Oh, yes, sir.

Q. And how about a team or wagon?

A. Travel with a team or wagon very easily.

Q. Now, what is the slope of the country going in a southwesterly direction from station 37, which is near the middle of Opening No. 5?

A. Slightly undulating country, up and down hills.

Q. But the average grade is in which direction?

A. Average grade in a southwesterly direction.

Do you want to know the per cent grade?

(Testimony of R. E. Tilden.)

Q. Yes, what is the average per cent grade in that direction? A. From this point to where?

Q. From station 37 down towards the southwest, three miles we will say.

A. Five per cent grade would be a high maximum, would be the limit, major grade would be 3 per cent.

Q. Going from station 37, near the middle of Opening No. 5, toward the northeast, what is the grade?

A. Five or 6 per cent.

Q. Mr. Tilden, have you ever had any experience in railroad surveying? A. I have.

Q. Where?

A. Assistant engineer for the Union Pacific system for two years; and built 20 miles of railroad for the Chicago Northwestern in 1899; assistant chief or principal resident engineer for the Tonopah and Goldfield Railroad in 1904 and 1905, which I really actually constructed on account of the chief engineer being sick. [471]

Q. Tonopah and Goldfield Railroad?

A. Tonopah and Goldfield Railroad, 1904 and 1905. Chief engineer of the Ohio Western in which we built 32 miles of grade, standard road; locating engineer for the Wheeling and Lake Erie Railroad in 1900, and locating engineer for the Union Pacific.

Q. Now, Mr. Tilden, what sort of a grade are railroads actually constructed upon, so that they can be operated, the maximum?

Mr. PLATT.—Object to the question on the ground it is incompetent, irrelevant and immaterial.

The COURT.—I think it is immaterial.

(Testimony of R. E. Tilden.)

Mr. LEWERS.—(Q.) Now, Mr. Tilden, calling your attention to the hill that you have described, and which is marked by the word “hill” on Exhibit “A,” I will ask you whether or not that hill closes, and if so to what extent, the territory between Toejam Creek on the north, and the North Fork of Siawappe on the south?

Mr. PLATT.—Same objection, that the question is leading, if the Court please.

The COURT.—I will allow that question; you may have an exception.

A. This hill or ridge runs in a northeasterly direction parallel to Toejam Creek, on the south side; and as I never went any further than the point, as I have stated before, marked 37 and 36 on that map, I could not say.

Q. That is not the question, Mr. Tilden. The question is—

The COURT.—Read the question.

(The reporter reads the question.)

A. As I observed, it didn't close, it was a continuous ridge.

Mr. LEWERS.—(Q.) A continuous ridge running which way?

A. In a northeasterly direction parallel to Toejam Creek.

Q. Now relatively, how much of the space north and south between [472] the two creeks does it cover?

A. I could not say. I didn't measure the top of it any further than this point right here.

(Testimony of R. E. Tilden.)

Q. Calling your attention to the north and south line as represented on exhibit "A" and exhibit 1, from North Fork up along that section line between 33 and 34, up to Toejam Creek, how much of that space in between does that hill cover?

A. As shown on exhibit "A"?

Q. In fact?

A. It would not cover over 2,500 feet, maybe 3,000, probably not that much.

Q. And out of a total distance of how much?

A. Of a mile and three-quarters.

Q. Now, I call your attention to what is marked on both plats as North's fence, sometimes referred to as Noble's fence; when did you first observe that fence? A. The latter portion of November, 1911.

Q. And did you make any examination of that fence? A. I did.

Q. Describe just what examination you did make.

A. While making the survey, I took the openings as I passed by them, noticed the gates if they were down or up, counted the number of wires, and noticed the kind of wire, new or old, noticed where the wire was cut by shepherders, or whoever may have cut it, or whether the wire had fallen down of its own accord; and also the condition of the posts.

Q. Will you describe that fence, as to what it is made of first? A. The majority of the fence—

The COURT.—Before he goes on to that, I would like to ask a question about these mountains. (Q.) Will you indicate on the map, the upper map (Exhibit No. 1) about the course of the ridge which runs

(Testimony of R. E. Tilden.)

through the opening, mark it in pencil.

A. The ridge, that runs east and west, well north-east and southwest. [473]

Mr. DENMAN.—Opening No. 5?

The COURT.—Opening No. 5. Just mark it in pencil.

(Witness marks course on Exhibit No. 1.)

A. I suppose it continues on up that way.

Q. Mark it clear through the whole length of it as far as you observed it. Where is the southwest end of the ridge?

A. Near the west quarter corner of section 34.

Q. Are there any ridges down in the territory surrounded by the blue? A. No, sir.

Q. Are there any ridges running northwest and southeast?

A. Northwest and southeast? Never saw any, no, sir. The only thing I wish to say is, that as in every creek there is a bank on each side of the creek, you go down that bank and up the other side of the bank; I should not think a person would call that a ridge, it has a top bank, same as a river or creek or anything.

Q. Were there many of those? A. Many creeks?

Q. Yes.

A. No, sir, just Toejam Creek. Toejam Creek has two banks, one on either side.

The COURT.—That is all.

Mr. LEWERS.—(Q.) Now, you may proceed and describe that fence, first as to what it was constructed of. A. Wire.

Q. What kind of wire, tell all about it.

(Testimony of R. E. Tilden.)

A. It is an old wire, it appears to be 15 or 20 years old, old-fashioned wire, and having 4 barbs; what I mean by four barbs, instead of having *to* points, have four points, which is an old-fashioned wire; very seldom see that wire now; the wire was rusted, very rusted. Some places 4 wires, some places 3 wires; some places in the fence the wire had been cut, and I particularly examined those cuts, and called the attention of the rodman [474] who was with me to examine them.

Q. Will you explain or describe what those cuts were like?

A. They were sharp distinct cuts, showed they had been cut with wire pliers, the end of the cut was rusty, covered with rust, which showed they had been cut a good many years.

Q. What was the general condition of the posts that you observed?

A. The posts were old, appeared to be redwood posts; redwood in that country lasts a great many years; the majority of the posts were standing, and in a great many places where the fence was down the posts were lying down, having rotted off.

Q. What was the general condition of the fence?

A. The fence was in a very dilapidated condition, would pass cattle countless places. I added up the openings from the beginning of this fence shown on exhibit "A" by end of fence.

Q. North end of fence?

A. Yes, sir, going in a southerly direction, west-erly direction and southwesterly direction, at the

(Testimony of R. E. Tilden.)

junction of Rock Creek and Toejam Creek—I will have to refer to my book—2,790 feet of space not openings, numbered, but space, adding them all up would make a space of 2,790 feet, and I don't think I got them all then.

Q. Have you indicated any of those openings on exhibit "A"?' A. I have a few.

Q. I call your attention to what you have marked as end of fence toward the north, will you, beginning there, describe the openings which you have indicated on the plat?

A. Beginning at the end of the fence, which is the northern portion of that map, and travelling in a southwesterly direction, first come to an opening 60 feet wide; thence continuing in the same direction, where I saw a road, a very distinct road, well marked, but a very old road, the gate was lying on the ground, and there was an opening of 120 feet. Continuing on in the same [475] direction to the angle of these two fences on Toejam Creek, I found no gate, the gate was down, and there was an opening of 120 feet, or more; then continuing on around this fence, which is on the south side of the creek, there were several openings, but I have not them here.

Q. What is on there?

A. In a southwesterly direction on around to an opening which is north of the ravine, west of Opening No. 5, I found an opening of 302 feet; the fence was down completely, the wires were pulled back, some of the wires were out in the bushes, I particularly took notice of this, how they ever got there I

(Testimony of R. E. Tilden.)

don't know, but they had evidently been there a good many years, in the creek, showed that the water had evidently washed then down there.

Mr. PLATT.—There is a good deal of voluntary testimony here. I have not objected, but I think the witness ought to be cautioned about giving his opinion.

A. Thence in a southerly direction, we came to a ravine that had a gate, the gate was down, and an opening of 503 feet; going up a slight rise, which is the left top bank of Toejam Creek, passing the angle, we came to an opening of 312 feet, the same opening that the automobile party rode through; thence continuing in a westerly direction—can I say a little more about that fence?

Mr. LEWERS.—Yes, describe that.

A. This opening which is 312 feet wide, and as stated by other witnesses, this fence was lying flat on the ground, the post and the wire was covered with snow; continuing further, there was another opening of a similar character, 195 feet; and another one a little further on perhaps 600 feet further, of 90 feet; thence we came to an angle in the fence going in a northwesterly direction, I suppose about [476] 300 feet further, 90 feet wide; this is the opening that the automobile party crossed the fence again. Thence I went in a northwesterly direction, and before reaching the junction of Noble's or North's fence with that of the Golconda Cattle Company, I saw an opening 120 feet wide; also an old gate which is in at the junction of Noble's or North's fence and

(Testimony of R. E. Tilden.)

Golconda Cattle Company fence. The Golconda Cattle Company fence—

Q. Well, I have just asked you about the Noble fence this time. Now, Mr. Tilden, what lies to the north of that Noble fence?

A. The bank of the creek is the first thing you have to go up, and then a gentle rolling country, interspersed with ravines and gullies, and such as that.

Q. Rolling in what direction?

A. In a southwesterly direction.

Q. But as you go toward the north directly, say from station 37 up beyond Toejam Creek, what is the character of the country, directly to the north, northeast and to the northwest?

A. The country as far as I saw was very barren; there was no rocks on it, smooth, but sloping in a southwesterly direction; I especially noticed it being barren, that particular part.

Q. Now, you have described the country as rolling; what caused that appearance of rolling, Mr. Tilden?

Mr. PLATT.—If you know.

Mr. LEWERS.—Oh, I am assuming that he is testifying to what he knows.

A. You mean the general country between the creeks?

Q. Yes, at any place there you have described it as rolling, what caused that appearance?

A. The general view of the country, up and down, undulating.

Q. What is the down part?

A. It is a descending down to [477] small val-

(Testimony of R. E. Tilden.)

leys, and up to the next little ridge, and down to the next little valley, and up to the next little ridge.

Q. And that is what you say caused the rolling appearance?

A. Rolling appearance, the physical features of the country.

Q. And what are the angles of the down, generally—well, I withdraw that question, because I admit it is rather vague. I don't suppose any two of them have the same angle?

A. I can give you some of the angles if you wish them.

Q. Well, if you have any actual angles, that is what I want. A. Up to what point?

Q. Taking this country to the northeast of station 37, what I want to get at is how sharp these ridges and these ravines are, if you know?

A. As I said before, I could not say around up here, I never traversed the country, 36 to 37, 37 to 38, 38 to 39, we ran up the creek until we got on the top bank of Toejam.

Q. Will you take a piece of chalk and on this part of the board over here indicate what you mean by rolling country, as to the surface line?

A. What part, in a southwesterly direction?

Q. This general country up through that Opening No. 5.

Mr. PLATT.—I don't see how we are going to get chalk marks on a blackboard into the record.

The COURT.—You can have it put on the map later, if you wish it done. There will be no trouble

(Testimony of R. E. Tilden.)

about reproducing that on exhibit "A."

(Witness illustrates on blackboard.)

Mr. LEWERS.—(Q.) What is the relative difference between the valley and the peak there, generally? A. In what part of the country?

Q. Right in around station 37.

A. Well, there would be a slope of 2 degrees 40 minutes; suppose this was 36, suppose this was 37, that slope would mean 2 degrees 40 minutes. [478]

Q. And you have represented about 45 degrees there, haven't you, actually?

A. Yes, that is probably a little exaggerated.

Q. What I want to get at is, not an exaggerated representation but as near as you can, an approximately close representation.

A. Well, the apparent line in here.

Q. Through Opening No. 5.

A. I will draw you a general profile through Opening No. 5.

Q. If you draw that to a scale we can have that prepared. A. I can prepare it for you.

Q. Well, you may do that later. Have you any tractor, or any means of determining your angles?

A. Not here.

Q. Well, leave that until you can prepare that from your actual measurements. Now, coming back down to Opening No. 6, will you describe the country surrounding that, as to the surface of the ground, and its general conditions, its shape?

A. Low, rounding hills, covered with sagebrush, and little ravines running into Willow Creek from

(Testimony of R. E. Tilden.)

both east and west sides.

Q. Now, going up to Opening No. A, 300 foot opening, marked on both plats, what is the character of the ground there; what is there, tell all about what is in that vicinity.

A. There is a grove of trees near the corner of what is called Nelson's fence.

Q. How far from the opening is that grove?

A. Seventy-five feet, I guess. In this grove of trees there is a spring, I would naturally suppose the grove of trees had been there, stumps on the ground 250 or 200 feet along there, and to the southeast of this grove of trees, across this creek—

Q. Which creek is that?

A. Across the middle fork of Siawappe Creek, to the southeast of this grove of trees, across Siawappe Creek, the ground is quite barren, showed it had either been [479] travelled by cattle or sheep climbing the hill there quite often.

Q. What is the grade down through that opening to the creek?

A. Giving it the extreme limits, 12 per cent.

Q. That is from what point to what point?

A. To point about midway of the opening to the bottom of the creek.

Q. And how far is it down to the creek?

A. It is from the point where I was located, which is midway of the opening, 735 feet, or from the right top bank to the bottom of the creek was 735 feet.

Q. And what is the character of the bank of that creek down there, so far as you observed it?

(Testimony of R. E. Tilden.)

A. It has an easy slope on a 12 per cent grade, and showed that cattle or sheep or something had been going up there; it was all barren at that one point on the south side of the fence.

Mr. PLATT.—I move the latter part of the answer be stricken out, on the ground it is a conclusion of the witness, if the Court please.

The COURT.—I will allow that to stand. You may have an exception.

A. They will naturally go up there and—

Mr. LEWERS.—Never mind, the question has been answered. Where is that opening with reference to the position of the spring, and of the creek?

A. The opening is midway between the spring and the creek, maybe it is nearer the spring than it is to the creek.

Q. Now, did you from the point where that grove of trees is situated at any time observe the character of the country lying to the east and northeast?

A. I did.

Q. On what occasions did you do that?

A. In November, 1911, latter portion of November, and about 8 or [480] 10 days ago, latter portion of February, 1912.

Q. Now you say that clump of trees is near the opening? A. Yes, sir.

Q. Will you indicate by some appropriate mark on there just where that clump of trees is? (Witness indicates on Exhibit "A.")

Q. Now, looking from there toward the east and northeast, what was the character of the country?

(Testimony of R. E. Tilden.)

A. Looking to the east you would look up a long valley which follows on the south side of Nelson's fence, you can also see a summit, where this fence goes over, which seems to be an even slope all the way to the creek from where the summit is; I would think that summit would be a mile away anyway from where the grove of trees is.

Q. Toward the northeast what did you observe?

A. The northeast I observed a kind of a rugged country interspersed with ravines, gullies and ridges.

Q. Well, what was the surface, with reference to anything passing over it?

A. Well, you could get over it all right on horseback.

Mr. PLATT.—The same objection to all this line of testimony.

The COURT.—It will be the same ruling and same exception.

Mr. LEWERS.—(Q.) Now, Mr. Tilden, I call your attention again to Exhibit "A" as compared with Exhibit No. 1, and particularly to the creek marked the "North Fork"; is Exhibit "A" a correct tracing as to what appears on Exhibit 1 in that respect? A. No, sir.

Q. What is omitted?

A. I left off what he calls steep ground.

Q. Would you take a pencil and on Exhibit "A" lightly trace in there the position of that, so that the two may generally correspond. (Witness indicates on Exhibit "A.")

Q. Did you see that or any portion of that terri-

(Testimony of R. E. Tilden.)

tory? A. No, sir. [481]

Q. I mean not with reference to the bank, but did you see any portion of that territory where that bank is represented to be on Exhibit 1; did you see that country?

A. Yes, sir, I could see it, a general view of it; I passed all along this fence line there from beginning to end of it, and I probably was in the neighborhood of where this pointer is along there.

Q. Where is that?

A. That is in the west half of section 4, township 39 north, range 49 east.

Q. Now, did you look across that Nelson fence toward the east and southeast when you were up there?

A. I did.

Q. Could you see the creek? A. No, sir.

Q. Could you see any of the banks of the creek?

A. No, sir.

Q. Why not?

A. There was ridges running out toward that way, ridges, like the creek ran out this way and ridges running in to it, ridges and valleys both.

Q. What do you mean by valleys?

A. A valley is a low place between two hills.

Q. Running down to the creek?

A. Running down to the creek, numerous valleys; I never paid any attention to the creek.

Q. Now I call your attention on Exhibit No. 1 to this other alleged barrier situated in the southwest quarter of section 4, and ask you if you saw that?

(Testimony of R. E. Tilden.)

A. No, sir.

Q. Is it there? A. I never saw it.

Q. What is the character of that ground there?

A. It is the same as up here. I can depict that on the board a good deal better by drawing a sketch.

Q. I want you to describe it.

A. Well, from the Nelson's fence there are ravines and ridges running in an easterly and southeasterly direction, the valleys were of the ordinary kind, there was one valley, a very wide one, [482] and that valley is located on about the northwest quarter of section 4, township 39 north, range 49 east; I particularly took notice of that valley, it is very rounding at the bottom, and it sloped in an easterly and north-easterly direction.

Q. And what is beyond that valley, the first thing you hit right beyond it? A. Which way, easterly?

Q. Yes. A. I never went there.

Q. Well, could you see it? A. No, sir.

Q. Could you see the valley?

A. You mean the valley I was looking down?

Q. Yes. A. Oh, yes, I was in that valley.

Q. What I mean is, what was the east boundary of that valley?

A. I could not see it, didn't go that far; I just stopped along the fence line where the valley crossed, the valley just went about a quarter of a mile beyond the fence and stopped.

Q. What formed the sides of the valley?

A. Round ridges; this was a very round ridge, and on this side of the valley there was a very long slope.

(Testimony of R. E. Tilden.)

Q. This side, what side do you mean?

A. South side, there was a very long slope, and on the north side it was a high ridge, round, pretty good place for a baseball ground.

Q. What do you mean by that, describe what it was; the place that you say was good for a baseball ground. What was it like?

A. Like where station 36; the ground was covered with dry grass at least a foot high, a foot to 18 inches high, the stems of dry grass were there; and it sloped in a westerly direction, an even slope, I suppose on a one per cent grade in a westerly direction; in a northerly direction it was about 4 per cent, I guess, maybe not quite that much, that is straight down, the ground, following the ground surface; and I never observed it very much further. [483]

Q. Now, what did you say is the width of Opening No. 6, as measured by you?

A. You wish me to give my exact measurements?

Q. Have you the width of that opening in your notes?

A. I have it in my mind, I have not it in my notes.

Q. What was it?

A. Four thousand one hundred feet.

Q. Opening No. 6 I am calling attention to.

A. Oh, 6; 3,400 feet.

Q. Calling your attention again to the point where we started with the elevations, at the lane below the reservoir, what is that lane, describe it?

A. It is a lane, a hundred feet average width all the way through, 4 wires along the posts, well built

(Testimony of R. E. Tilden.)

road made through it.

Q. What road?

A. Public road from Tuscarora to Golconda, or from Gold Circle, either one.

Mr. LEWERS.—That is all.

Cross-examination.

Mr. PLATT.—(Q.) Indicate if you will upon Government's Exhibit No. 1 the highest northeasterly point of your survey observation. A. Thirty-six.

Q. Will you point it out upon Government's Exhibit No. 1.

(Witness indicates.)

Q. Now, how do you indicate it, in order that it may be recorded?

A. Along right in here (pointing).

Q. How would you indicate it upon the plat?

A. How would I indicate it upon the plat?

Q. Yes. Is it a point at the extreme northeasterly end of the Nelson fence? A. No, sir.

Q. Well, where is it, that is where you seem to be pointing.

A. Well, the sketches are so different, you know, it is pretty [484] hard to—

Mr. LEWERS.—Well, indicate approximately.

(Witness indicates on map, Exhibit No. 1.)

A. That may be a little nearer, it is somewhere in that neighborhood; maybe it might be a little closer to this corner.

Mr. PLATT.—(Q.) Well, will it be fair to state that it is a point about in the northeasterly direction about three-quarters the distance along the Nelson

(Testimony of R. E. Tilden.)

fence, as you have indicated it there upon the plat, and a little to the west there?

Mr. DENMAN.—Object to the question, in the first place as leading, and in the second place, the distance is manifestly about—

Mr. PLATT.—Well, 9/10, if counsel likes it better.

Mr. DENMAN.—9/10 is better.

Mr. PLATT.—You said yes, didn't you?

WITNESS.—No, sir, I didn't answer it at all.

Q. At any rate it is at a point indicated on the plat as about a quarter of an inch below the township line into which North's fence extends?

A. I should think so, approximately.

Q. Is that approximately correct? A. Yes, sir.

Q. Now, that is the highest northeasterly point of your observation, is it?

A. As per those maps, it would be. I should not think it is the same as this map; it would not be according to Exhibit "A." That would be the highest portion (indicates).

Q. But relatively, upon Exhibit 1 that is the point, isn't it? A. Yes, sir.

Q. And as to township, section and range, it is located relatively correct, isn't it?

A. Approximately.

Q. Now is this country, Mr. Tilden, up in the northeast indicated in the blue, is that country just the same as to topography as the country indicated in the white upon the plat? [485] A. No, sir.

Q. What is the difference?

A. From a point near the middle of section 33 to

(Testimony of R. E. Tilden.)

the southwest corner of, or to the middle of 5, it is a much evener and more level country than this is in here.

Q. You mean to say that a certain section of this country represented in the blue is more even and regular than the country represented in the white within the so-called inclosure?

A. I would not say all the white, no, sir, a portion about midway of the white, very rough in there.

Q. You were here in the courtroom, weren't you, when Mr. Sheehan and Mr. Button testified on behalf of the defendant? A. Yes, sir.

Q. Did you hear them testify that this section up here in the northeast was a mountainous country, as compared with the country designated in the white upon the plat?

Mr. DENMAN.—I object to that, in the first place it calls for a comparison, and is not proper testimony, and second—

The COURT.—No, this witness should not criticize the testimony of other witnesses.

Mr. DENMAN.—And in the second place, it does not fairly describe what the testimony was. The testimony was that the country lying to the northeast from where they stood was rougher as a whole than the country lying to the southwest, but as to where they actually stood, there was no such testimony.

Mr. PLATT.—I will refer to the record as to what the testimony actually was, if it becomes necessary.

WITNESS.—You see I am giving definite points, to the middle of section 33 and the middle of 5.

(Testimony of R. E. Tilden.)

Q. Now, what is the general condition of this country represented in the blue upon the plat in the northeastern section of the plat [486] to which I have just pointed, as compared with the general condition or topography of the country shown in the white within the inclosure?

A. It is a better country to travel over than the general country.

Q. You say it is a better country to travel over?

A. For at least three-quarters of a mile or mile, take it for a mile.

Q. Can you estimate just about how many miles of country there are in that northeasterly section as represented in the blue there?

A. Well, this portion here, you have an opening No. 5, $1\frac{1}{4}$ miles; that $1\frac{1}{4}$ miles to travel from east to west, or from west to east, would be a very nice country to travel in.

Q. You understood my question, didn't you, Mr. Tilden? I asked you if you could estimate about how many miles of country were represented in the blue upon the plat in the extreme northeasterly section of that plat?

A. I think about one square mile.

Q. One square mile? A. Maybe a little more.

Q. Are there any mountains or hills up in that section of country? A. Not between the fences.

Q. Did you understand that question? I asked you whether there are any mountains or hills within that section of country represented in the blue in the northeasterly extremity of that plat?

(Testimony of R. E. Tilden.)

Mr. DENMAN.—I object to that question, because it does not definitely set forth what the northeasterly extremity is; that may run from way down below on the creek, or close up there. If Mr. Platt will indicate by numbers, which will be very easy to do, what particular sections he is referring to, that will prevent any ambiguity. I object to the question on that ground.

The COURT.—You may answer the question.

A. There is a hill in the west half of section 34, which is the [487] west end of the hill; this point is from station 37, whatever it was, 5,000 and some feet distance; I can give you it exactly again if you want.

Q. Now, is that the only hill in that section of the country?

A. No, sir, there is a small rocky knoll or outcrop between 37 and 38, station 37, surveyor's station 37, and surveyor's station 38.

Q. State whether or not you would call that section of country I have indicated a mountainous or hilly country.

A. I would not call it mountainous; hills may be all the way from 15 feet high to 1,000 feet high; mountains are much larger.

Q. Are there any hills 1,000 feet high in that section?

A. One thousand feet above what, surrounding country?

Q. Well, you are answering the question, and I am asking you a question based upon your answer. You

(Testimony of R. E. Tilden.)

say hills may be all the way from 15 to 1,000 feet high; now, I ask you whether there are any hills in that country 1,000 feet high? A. No, sir.

Q. What is the highest one?

A. Eight hundred and forty-nine feet.

Q. It comes within 150 feet of being 1,000.

A. The lowest portion in here (indicating on plat).

Q. Now, as a matter of fact, Mr. Tilden, the tendency of this country, beginning from the southwesterly section of this plat and running in a northeasterly direction up to the extreme northeasterly point or corner of that plat, is toward an elevation higher toward the northeast, is it not?

A. Yes, sir.

Q. And is it not a fact when you get up into what is depicted upon that plat as the Toejam Mountain, in that section of country, that you find much more hilly country up there than you find down here in the southwesterly portion? A. Yes, sir.

Q. And is it not a fact you find much more hilly country up there than you find in that middle portion of the plat represented in [488] the white?

A. I should not think so, no, sir; about the same country through here, and up the south bank of Toejam Creek as far as I went, about the same as this, maybe the gullies are a little deeper.

Q. You say maybe the gullies are a little deeper in the northeasterly section than they are in the middle of that plat; is that the only distinction you make?

A. I should think so.

Q. Well, I want your honest opinion about it.

(Testimony of R. E. Tilden.)

A. Yes, sir.

Q. Based upon the fact as you saw it. Will you testify that the section of country in the north-easterly extremity of that plat is not more precipitous as to ravines and gullies and hillsides than it is in the center?

A. I have not been in the center to any extent; all I could do was to see over there; I could see from this place up this way, and I have been around in this country here (indicates), and I could see up through there, but right in the middle I have never been.

Q. Then you cannot testify positively, can you, as to the relative difference in topography between that northeasterly section of that plat and the center part of it? A. I cannot.

Q. Now, were you in a position so that you could see the so-called barrier represented upon Government's Exhibit No. 1, in sections 4 and 3 of township 40 north, range 49 east?

Mr. LEWERS.—To which we object on the ground that is not labeled barrier at all, that is pointing to what is marked "bank."

Mr. PLATT.—Well, I call it a barrier; it is indicated as very steep upon the plat, if the Court please; the witness knows what I mean.

A. I could see in that direction, but I was not in a position to examine closely.

Q. Well, you would not state positively from your point of observation [489] that that country was not very steep there, would you?

A. No, sir, only by the ravines that I saw going

(Testimony of R. E. Tilden.)

into there, and the general run of a ravine is not to jump right square off.

Q. But you were not at a point of observation so that you could testify positively whether the country was very steep there or not, were you?

A. I never was over that far.

Q. Now, you have sketched in here in green pencil, outside of the subject matter of the plat itself, what purports to be a representation of a mountain or hill, or mountainous country; I wish you would state what that is.

A. It is a long ridge; as I have stated, the west end is about 849 feet high above station 37, from this hill are gullies running down to Toejam, and I suppose running down to the creek on the south side.

Q. Now, as compared with such portion of the country as you saw, represented upon the plat in the white within the so-called inclosure, what kind of a country would you call that? I am asking as to the general condition of the country, whether mountainous, hilly, flat, or rolling, as compared with the section of the country represented in the white within the inclosure.

A. As I stated previously, all I could see was the west end of this hill; from there I went over to Toejam Creek, and ran the lines up to a point just north of the west end. I also was on the left top bank of this creek, and I observed up toward the mountain, further than that I did not go, any further than here.

Q. You use the term you "observed up toward the mountain," now what mountain, where was it?

(Testimony of R. E. Tilden.)

A. This point marked up and across a hill, the west half of section 34.

Q. Now, there is no question about a mountain being there, is there?

A. I would not call it a mountain, because I call it a hill. [490]

Q. You say you observed a point up toward the mountain, when you said mountain, didn't you mean it?

A. I mean hill, because mountains are from 1,500 feet high.

Q. How high was this hill or mountain, which you say now is a hill?

A. From above station 37 it is 800 odd feet high, 840 or something; 849 above station 37.

Q. Now, you made that observation of this hill or mountain from some little distance, didn't you?

A. I did.

Q. You didn't go very close up into that country, did you?

A. Five thousand four hundred feet, I think.

Q. From it?

A. Five thousand four hundred feet from station 37.

Q. That is a little over a mile, isn't it?

A. Yes, sir.

Q. So that you cannot testify as to any accurate observation made right in the country itself, can you?

A. You mean on top of the hill?

Q. Yes. A. Calculation, trigonometry.

Q. But you say you were a mile off when you ob-

(Testimony of R. E. Tilden.)

served this hill, or mountain, didn't you?

A. Yes, sir, the top of it.

Q. Therefore you cannot testify from an observation taken in the hill or mountain itself, can you?

A. Generally don't go on top.

Q. I don't care what you do generally.

A. I can testify I was in the vicinity; I was in that vicinity.

Q. You do testify you were a mile away from it, don't you?

A. Over a mile from the top; I was at the toe of the slope, station 37 is very near the toe of the slope.

Q. And you have correctly indicated on this plat, or with approximate correctness, just how close you were, haven't you? A. Yes, sir.

Mr. DENMAN.—Which plat do you refer to?

Mr. PLATT.—Government's Exhibit No. 1. [491]

Q. When did you begin to make your survey or observations in that section?

A. In the vicinity of that mountain?

Q. Yes. A. Tuesday, November 23d, 1911.

Q. Now, when did you begin to make your surveys for the purpose of submitting a report in this case, and testifying as a witness?

A. I didn't quite understand that.

Q. When did you first begin to make any surveys of any part of that country represented upon the plat known as Government's Exhibit No. 1?

A. The question has been answered, November 23d, 1911.

Q. Now, were you ever up in that country before that time?

(Testimony of R. E. Tilden.)

A. You mean where Opening No. 5 is?

Q. No, I mean the whole country as shown upon the plat? A. Yes, sir.

Q. When were you up there before?

A. The first time, the latter portion of October, 1910.

Q. What did you go for?

A. To make a survey of Squaw Valley.

Q. With a view of testifying in this case?

A. No, sir.

Q. Did you observe at that time any of the fence represented upon Government's Exhibit No. 1?

A. I did.

Q. Did you go for the purpose of making an accurate observation of the fence?

A. Of the opening?

Q. Of the fence or the openings.

A. Of the fence, I did; I never knew anything about openings.

Q. Didn't know anything about openings?

A. I took the majority of them, but I never knew I had to take them.

Q. Just state what you went for.

A. To make a complete topographic survey of the entire Squaw Valley, constituting the lowlands from the mouth of Toejam Creek and Rock Creek, and from the dam down to the mouth of the canyon.

[492]

Q. Then it was an observation as to the general nature of that country, regardless of fences or anything else?

(Testimony of R. E. Tilden.)

A. Yes, sir. Well, not regardless of fences, I had to take fences which included the topographic map.

Q. But you didn't go there and make your survey for that express purpose, of ascertaining as to when a fence was built, or how many openings there were in the fence, or anything of that sort? A. No, sir.

Q. Now, as a matter of fact, Mr. Tilden, the first time that you went upon this ground for the purpose of testifying in this case, or of giving information to the defendant in this case, or to defendant's counsel, was when you first made your visit, November 23d, 1911, was it not? A. Yes, sir.

Q. Now, so far as the gaps in the fence, or the general condition of the fence itself, you know nothing from any information derived prior to November 23d, 1911, do you?

A. Only what I observed on the ground.

Q. And you just testified a few moments ago that you were not looking for gaps upon any of your visits prior to November 23d, 1911? A. No, sir.

Q. Is that correct?

A. Well, not looking for any by any special order. I observed all the gaps pretty near, especially some very large ones.

Q. You say you observed all the gaps pretty near.

A. I was not told to get them.

Q. Well, you say you observed them all pretty near; did you observe them all?

A. As many as I obtained; a person might skip some of them.

Q. You could not testify positively now, could you,

(Testimony of R. E. Tilden.)

as to the exact number of gaps that you observed upon any of your previous visits?

A. The exact number, no, sir. [493]

Q. Your recollection upon that would be somewhat hazy, would it not?

A. Not the majority of them; I can give you the majority of them.

Q. Let me ask you, Mr. Tilden, when did you first discover that the North fence was down?

A. That is the Noble fence?

Q. Well, it is shown upon the plat as North's fence.

A. November, 1911.

Q. You did not make that discovery before, did you? A. No, sir.

Q. Now, you are sure that you didn't notice the North fence down before November 23d, 1911?

A. No, sir.

Q. There is no doubt about that, is there?

A. I never was up there before.

Q. You were never there before?

A. No, sir. I answered that question yesterday, or Saturday.

Q. Well, I am very glad to have you answer it again to-day. Now, you don't know when North's fence fell down, do you? A. Do not.

Q. You don't know whether it tumbled down during the winter of 1911, do you? A. Do not.

Q. And you don't know whether it was pulled down before you went up there, do you, as a matter of accurate knowledge?

A. Do not. I would judge it had been pulled down

(Testimony of R. E. Tilden.)

from the looks of the wires and the cut.

Q. Oh, that is your best judgment, that the fence had been pulled down?

A. The wires had been cut and pulled around, so cattle and sheepmen could go through, using my experience by—

Q. Do you know—

Mr. DENMAN.—Let him finish the answer. Finish your answer.

A. (Contg.) Judging from my experience, the ends of the wires [494] were rusty and showed it had been cut quite a number of years, and I could see no splice in it.

Q. Now, do you know, Mr. Tilden, whether cattle or sheepmen in trying to go through that fence, cut it, or whether the Golconda Cattle Company cut it?

A. I would not say the Golconda Cattle Company cut it, because I think it is probable, but from the looks of the rusted wire—

Q. Do you know whether Mr. North cut it or not?

A. No, sir.

Q. Do you know whether it was cut by cattle or sheepmen that wanted to get in there and could not, and found the fence in the way, and therefore cut it?

A. I should think not.

Q. You don't know that, do you? A. No.

Q. Now, what part of that fence was cut?

A. The part above Toejam, through section 28 and 27, township 40 north, range 49 east, and section 32, township 40 north, range 49 east.

The COURT.—Does this question refer to the

(Testimony of R. E. Tilden.)

places where you found the wire cut, or more places where there were gaps?

Mr. PLATT.—Just where they were cut.

WITNESS.—Might have seen a great many more, but I never examined all of them.

Q. But you testify the fences were cut in the places you have just enumerated? A. Yes, sir.

Q. Have you had any experience, Mr. Tilden, as to the custom of ranch owners about cutting their own fences?

Mr. LEWERS.—If the Court please, I object on the ground the question is vague and indefinite, and there is no testimony there is any established custom about cutting fences.

Mr. PLATT.—We have had a lot of opinion testimony here, if the Court please, to which I have objected, and which the Court [495] in the exercise of its discretion has permitted.

The COURT.—Now, you want to go into the question as to whether there is a custom about cutting fences?

Mr. PLATT.—Yes, your Honor.

(Discussion by counsel.)

The COURT.—I will allow this question, and I think the answer of the witness will probably eliminate the whole matter: Do you know what the custom of cutting fences is in this country here, by sheepmen and cattlemen?

A. Do not.

Mr. PLATT.—(Q.) Well, as a matter of fact, Mr. Tilden, you testified as an expert engineer and sur-

(Testimony of R. E. Tilden.)

veyor, didn't you?

A. Yes.

Q. You have not had any experience as a cattleman or ranch man, have you? A. I have.

Q. Oh, you have? A. Yes, sir.

Q. How much experience have you had as a cattleman?

A. I was born on a Louisiana plantation, and lived there 18 years, drove sheep, plowed cotton and corn, and cultivated and raised crops, and understand farming perfectly.

Q. You don't know anything about the custom of ranchers cutting their own fences?

A. Do not; have gates down in that country and have plank for timbers, plentiful, and put wires on top.

Q. Then you have not any familiarity with the custom about cutting fences or putting up gates in fences?

A. Not in this country; we put up gates where we have to go through them, along through the fence.

Q. And the only experience you have had is down in Louisiana, is that true?

A. I have lived in Nevada since March 14, 1904.

Q. What experience have you had as a cattle and ranch man in Nevada?

A. Surveying ranches, engineer for irrigating [496] companies, one of my surveys is Twin Fall Canal, Idaho.

Q. As a matter of fact, you at these times were engaged in the expert work of surveying, and not in ranching?

(Testimony of R. E. Tilden.)

A. No, not in ranching, I have been all over ranches.

Q. Do you know how many feet above sea level the Dutton Ranch house is?

A. I really don't know; I understand it is about 5,000, or more than 5,000, I am not certain about that; I would not want to go on authority as to that: I don't know.

(Recess until 1:30 P. M.)

AFTERNOON SESSION.

R. E. TILDEN, cross-examination continued.

Mr. PLATT.—(Q.) Do you know how long North's fence is?

A. Well, I could scale it off of the map very closely, I can't tell you off-hand.

Q. I wish you would tell to the best of your ability.

A. Now, from what point?

Q. Well, from a point indicated upon Government's Exhibit No. 1, beginning at the left extremity.

A. Oh, I see, I understand. About 2 9/10 miles, not quite 3, might call it 3.

Q. About 3 miles? A. About 3 miles.

The COURT.—(Q.) Is that the total length?

A. No, sir, that is just shown on exhibit 1; from the junction of what is called Golconda Cattle Company fence on northeasterly.

Mr. PLATT.—That is all. [497]

Redirect Examination.

Mr. LEWERS.—(Q) Mr. Tilden, does Exhibit No. 1 show the total length of North's or Noble's fence? A. No, sir.

(Testimony of R. E. Tilden.)

Q. Does Exhibit "A" show any more of it?

A. It does.

Q. Does Exhibit "A" show the extreme extent to the north of what is known as the North fence or Noble fence? A. It does, the north end of it.

Q. Now, what was the highest, I mean in elevation, station that was established by you in your survey?

Mr. PLATT.—I object, if the Court please, upon the ground it is improper cross-examination, and was brought out in the direct.

Mr. LEWERS.—No, there were some questions in cross-examination that produced a certain amount of confusion in my mind, at least, whether it meant highest in distance or highest in altitude, that is what I want to get at.

The COURT.—Very well.

A. The end of Noble's fence, I have not got it worked out, but it is considerably higher.

Q. What is the number of the station, I want to get at?

A. Oh, the number of the station? I have not the elevation worked out. Station 48-B, end of Noble's fence line.

Q. That is the end of Noble's fence line as shown on Exhibit "A"?

A. Yes, sir, I can put it on there.

Q. I wish you would mark it.

(Witness indicates point on Exhibit "A.")

Q. And what is the relative height of stations 36 and 37 in elevation?

A. Thirty-seven is 122 feet lower than 36.

(Testimony of R. E. Tilden.)

Q. Now, you have stated in cross-examination that the hill represented in section 34, was 849 feet higher, I believe you said, than some station down below, what station was it? [498] A. Station 37.

Q. Now, how much higher is the top of that hill than station 36?

A. Well, it is 849 feet less 122, 727 feet, above station 36.

Q. Now, to get at the same thing in another way, taking a cross-section by your stations generally across Opening No. 5, which is the lowest point on that cross-section? A. By the station line?

Q. Yes. A. Station 37.

Q. Then your height of 849 feet was from the lowest point in Opening No. 5 to—

A. (Intg.) On the survey line.

Q. On the survey line, to the top of that hill, was it? A. Yes, sir.

Q. And what was the farthest point north that you went on that survey?

A. Station 48-B, as shown on Exhibit "A."

Q. And that is what?

A. The end of fence, the end of Noble's or North's fence.

Q. And where do you say station 46 is?

A. Forty-six is at the junction of a ravine running through the east half of section 38 on Toejam Creek.

Q. With reference to this hill you have represented on section 34, where is station 36, what direction?

A. It is slightly northwest, almost due north you

(Testimony of R. E. Tilden.)

might say, 5 degrees northwest.

Q. Now, calling your attention to the places that you were asked concerning the cutting of wires in cross-examination, how many places were there that you observed the wire cut; I want to get that definitely?

A. I only examined two places; one was about, from the scale it looks like maybe 300 feet south of the end of—

Q. Which end?

A. The north end of Noble's fence, marked "End of fence" on Exhibit "A." [499]

Q. Where is the other?

A. The next place was about three-quarters of a mile west of station 37, as shown on the map in section 32.

Q. Now, calling your attention to the long gaps you have testified to in places where the fence was down, one I believe you testified was 312 feet; was that correct? A. The fence was down, yes, sir.

Q. What was the condition of the fence there, as to whether it had been cut or not?

A. It had not been cut; the wires and posts had both fallen, lying on the ground.

Q. What was the condition of the posts?

A. Old, dilapidated, rotted off.

Q. And at other places along the fence what was the condition of the posts and wires?

A. Some places the wires were down on the ground and posts standing; other places the posts were rotted off, standing in the fence; other places down

(Testimony of R. E. Tilden.)

altogether; sometimes there was a middle post down.

Q. At these two places you examined, where you said the wires were cut, state again what was the appearance of the ends of those wires, where they were cut?

A. Rusty; very very rusty; showed that they had been exposed to the weather for quite a long time.

Mr. LEWERS.—That is all.

Recross-examination.

Mr. PLATT.—(Q.) Now, Mr. Tilden, will you give us the entire length of the North fence as you have shown it upon your plat?

Mr. LEWERS.—You mean starting from the same point?

Mr. PLATT.—Starting from the same point.

A. I can only give it to you approximately, scaling off. [500]

(Witness measures on map.)

A. Five miles from the junction of the Golconda Cattle Company fence to the end of the fence marked 48-B on Exhibit "A."

Q. That is approximate, you say about 5 miles?

A. About 5 miles, roughly.

Q. Now, is it your understanding that North's fence and Noble's fence are two different fences, or are those two names applicable to one line of fence?

A. Same fence.

Q. Same thing; so when you say North's fence, it might mean Noble's fence, or when you say Noble's fence it might mean North's fence?

A. Same thing.

(Testimony of R. E. Tilden.)

Q. In other words, there are two names for the same fence, is that right?

A. Identical, although I never heard the name of North fence until I came here.

Q. But that is your understanding, is it not?

A. Yes.

Q. And it is upon that understanding you have identified both the plats? A. Yes, sir.

Mr. LEWERS.—We admit that is the fact, Mr. Platt.

Mr. PLATT.—(Q.) Did you go to the extreme northeasterly point of the North's fence as you have shown it upon your plat?

A. I went within 488 feet of the end of the fence line, my rodman went to the end of it; I could see the end of the fence from where I was.

Q. Now, is there any other line of fence meeting the so-called North fence, as you have shown it upon the plat, either at right angle, or any other angle?

A. Not that I know of.

Q. You say you were within 480 feet of it?

A. Four hundred and eighty-eight.

Q. And you didn't notice from that distance any fence? A. To the east or west?

Q. To the east or west, or easterly or westerly of it? A. No, sir, there wasn't any. [501]

Q. Well, is it reasonable to state that the north-easterly end of the North fence did not form one side of any sort of an inclosure? Do you understand what I mean by that?

A. Form one side?

(Testimony of R. E. Tilden.)

Q. Yes.

A. I would not think it did; I never saw any.

Q. You never saw any. In other words, roughly speaking, those dotted lines may represent the North fence? A. Yes, sir.

Q. Now, state whether or not after you went within 480-odd feet of this end line, whether you noticed any fences going in either one of those directions, and other fences going approximately in those directions, so that this line fence about which you testified formed one side of a field fence.

A. There were no other fences.

Q. Then my understanding is that in a southeasterly direction from the North line fence, and in a northwesterly or westerly direction from the North line fence, and continuing straight on from the north-easterly direction from the end of that North line fence, there were no other fences? A. Yes, sir.

Mr. LEWERS.—What do you mean by North line fence, do you mean North fence?

Mr. PLATT.—Just read the question.

(The reporter reads the question.)

Mr. PLATT.—I mean the North fence or Noble's fence, when I say North line fence.

A. I understood that.

Mr. PLATT.—That is all. [502]

[Testimony of E. J. De Lano, for the Defendant.]

E. J. DE LANO, called as a witness by the defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. LEWERS.)

Q. Your name is E. J. De Lano? A. Yes, sir.

Q. Where do you live? A. Golconda.

Q. How long have you lived there?

A. Four years.

Q. What is your business or occupation?

A. Miner.

Q. Have you ever been in the Squaw Valley country? A. Yes.

Q. When were you there?

A. Last November.

Q. What were you doing while you were there?

A. I was assisting Mr. Tilden on a survey.

Q. What were you doing while assisting him, what function did you perform?

A. Why, I expect you would call it head rodman.

Q. Now, I call your attention, Mr. De Lano, to the two exhibits, No. 1 and "A," and particularly to the northeastern portion of these two exhibits, the territory between Toejam Creek on the north and Siawappe Creek on the south, and ask you if you are familiar with any portion of that territory?

A. Well, quite, yes.

Q. How did you gain that familiarity?

A. By carrying this rod over it.

Q. Now, if you will step down to the map a moment. I call your attention to a symbol on Exhibit

(Testimony of E. J. De Lano.)

“A,” in section 34, on the west side, marked with a cross and the word “Hill,” and ask you if you know what that is, and where it is on the ground?

A. Yes, I think I do.

Q. What is it?

A. Why, it is a rolling hill in there, I don't know what else. [503]

Q. I also call your attention to a red fence line running up there, joining onto a black fence line below, marked “Nelson's fence,” and ask you if you know where that fence is on the ground? A. I do.

Q. Were you on any portion of that ground?

A. Yes, sir.

Q. I again call your attention to the portion marked “Nelson's fence,” and also to the part which is marked Opening No. A, with the word “Trees” there, do you remember that ground?

A. I do; yes.

Q. What is there, what is your recollection?

A. A bunch of quaking-asp there, and a spring.

Q. Now, going further north along the Nelson fence represented by red on the map Exhibit “A,” will you point out on that map where you went, if at all, at any point east of that Nelson's fence?

A. Well, I went to a point down in here, somewhere in here (indicating).

Q. Down in here indicating the southwest corner of section 34?

A. Right in that neighborhood somewhere.

Q. I call your attention to a creek on Exhibit “A,” marked “North Fork,” and ask you if you know where that is? A. I do; yes.

(Testimony of E. J. De Lano.)

Q. Did you see it at any time? A. Yes.

Q. When?

A. When I was out there on the survey.

Q. How close were you to that creek?

A. Well, I was right on the creek, I crossed it several times, I think.

Q. Now, I call your attention again to that creek, and ask you particularly with reference to the south bank of it, whether you observed the banks of that creek?

A. Well, yes, I can remember the banks of the creek well.

Q. Describe them.

A. Well, it is kind of a rolling sort of a country there, is all, raising on the outside into little peaks.

[504]

Q. But particularly with reference to the bank of the creek, right at the creek?

A. Oh, right at the creek?

Q. Yes.

A. There is a little valley there, not exactly a valley, but a little bottom in there.

Q. Well, how steep would you say those banks of the creek are?

A. Oh, they are 25 or 30 degrees, I guess, possibly not quite as steep as that; maybe about 20 or 25 degrees.

Q. Could cattle or anything else cross those creeks?

A. Oh, yes.

Mr. PLATT.—Same objection, if the Court please, to all this line of testimony, without repeating.

Same ruling and exception.

(Testimony of E. J. De Lano.)

A. Nothing to stop them that I saw; cattle can travel over that country anywhere.

Mr. LEWERS.—(Q.) Now, I call your attention to a dotted line running across what is known as Opening No. 5 on Exhibit “A,” and marked “Toejam Mountain” as shown on Exhibit No. 1, and ask you if you were on any portion of that territory where that is represented to be?

A. Right through there?

Q. Yes.

A. Well, I think I did cross right in here.

Q. That is indicating through the west side of section 33?

Q. Yes, right through there.

Q. How near were you to any other portion of that so-called barrier toward the southeast end?

A. Towards the southeast end?

Q. Yes. A. I wasn't any nearer than in here.

Q. In here indicating near the south line of section 34, and in the southwest quarter. Now, did you see that barrier?

A. I don't know as I understand what a barrier is.

Q. What did you see there in that ground I have pointed out, where this is represented to be on the map? [505]

A. Well, just natural rolling hills there, same as everywheres all over that country.

Q. I will ask you whether or not at the place where that is represented to be cattle could pass through?

A. Why, certainly.

Q. Could anything else? A. Yes.

(Testimony of E. J. De Lano.)

Q. What?

A. Oh, you could drive a wagon through there.

Q. Well, describe the ground as near as you can.

A. Well, I don't know as I can describe it in any other way than rolling hills, up and down, all manner of shapes.

Q. In acting as rodman where, if anywhere, did you go in the neighborhood of Toejam Creek?

A. Yes.

Q. Well, where did you go?

A. We came down on Toejam Creek, down to a point about here somewhere, I should judge, on the map somewhere in there (indicates).

Q. Indicating near the northwest corner of section 33. Now, what was the character of the ground or country in going over from Nelson's fence to that point on Toejam Creek?

A. Well, it was a very low place in that divide that comes down here, very low.

Q. What sort of surface, on the ground?

A. Well, it was slightly rolling.

Q. Now, did you at any time when you were carrying that rod over there, or when you were in there, observe the country to the east and northeast of this place near Toejam Creek, where you say you went with the rod?

A. Yes, a man would naturally look to see the country as he was going along.

Q. What was the appearance of that country looking towards the northeast?

A. Natural rolling hills, raising up gradually all

(Testimony of E. J. De Lano.)

the way up to the divide.

Q. Could cattle pass up through there?

A. Yes, sir. [506]

Q. Anything else?

A. Well, yes, I never saw any place—you could get a wagon through most anywhere.

Q. Now, Mr. De Lano, state whether or not anywhere on that survey you noticed any trails of any kind.

A. Oh, there is stock trails all over that country.

Q. Where?

A. All up through here and through here. Wherever we went on that survey, I noticed stock trails all around everywhere.

Q. Wherever you went with the survey?

A. Yes, sir.

Q. Did you go along any portion of what is known as the Noble fence? A. Yes, sir.

Q. And will you describe that fence, what you found, its condition, all about it?

A. Well, it is a very old fence, and in a very dilapidated condition, a great deal of it down.

Q. What kinds of wires and posts, and what was their condition?

A. Ordinary posts, there were wires rusted a great many places, and broken down on the ground, some places wound up and taken down the road, several places. I consider it is a very old fence in a dilapidated condition, that is all.

Q. Would it turn cattle?

A. Might be places in it it would.

(Testimony of E. J. De Lano.)

Q. But generally would it? A. No.

Q. And how far up on that fence did you go to the north? A. Went up to the end of it.

Q. Was there any fence there going off in any other direction? A. No.

Q. Did you see any cattle trails anywhere in that vicinity? A. Yes, even saw wagon tracks up there.

Q. Now, beyond the north end of that fence could cattle pass? A. Yes, sir.

Q. About how large a space was there in there for them to pass through?

A. Well, from there to the top of the hill, I [507] guess half a mile or more.

Mr. LEWERS.—Take the witness.

Cross-examination.

Mr. PLATT.—(Q.) Could not they pass through any further than that, just from there to the top of the hill?

A. From the end of the fence to the top of the hill?

Q. Yes. A. I don't understand you, sir.

Q. Could not they pass through any greater distance than that, from that point to the top of the hill?

A. I don't understand that question.

Q. Well, how high was the top of the hill from the point to which you have just testified?

A. The top of the hill? Oh, it was probably 700 or 800 feet, probably higher.

Q. Higher from the end of the fence?

A. The top of the main range we were travelling up on.

Q. You could see that, could you, pretty plainly?

(Testimony of E. J. De Lano.)

A. Oh, yes.

Q. How far away from it were you?

A. Half a mile away, I guess.

Q. You say it went up 1,000 feet in half a mile?

A. I expect there were points on it 1,000 feet.

Q. It is quite a steep hill, is it not?

A. Quite a steep hill, yes.

Q. Did it have little ridges and projections on it?

A. Yes, what you would naturally expect on a hill of that kind.

Q. Well, it would not be very easy for cattle to get over the top of that, would it? A. Oh, yes.

Q. No trouble at all? A. No trouble.

Q. How steep was it down on the other side?

A. I didn't go over the other side [508]

Q. You don't know then?

A. Don't know what the other side is at all.

Q. Did you go anywhere that Mr. Tilden didn't go?

A. Well, yes, I think I went some points he didn't go.

Q. How far away were you from him at any time?

A. Oh, I don't know as I could remember.

Q. Well, you were just holding the chain for him, weren't you? A. Yes, as far as he could see.

Q. You were always in sight of him, weren't you?

A. Yes.

Q. Well, as a matter of fact, this country where you saw that hill which you say is about 1,000 feet higher than the land at the end of the North fence, is a hilly country, is it not?

A. It is a hilly country, yes.

(Testimony of E. J. De Lano.)

Q. Well, it is hillier, is it not, than it is down here upon these rolling places? A. Oh, yes.

Q. Well, it is considerably hillier, is it not?

A. Well, yes, there is a mesa there, as you get to the top of the mountain it becomes rougher.

Q. Is there a mountain there too?

A. I consider them all mountains.

Q. Oh, you do, in that section of the country?

A. They are known as mountains through there, yes.

Q. Do you know what name they give them?

A. No.

Q. This section of country shown in blue upon this plat, I want you to examine it, so there will be no misapprehension about it; I mean this blue in the north-east extremity of Exhibit No. 1, where all these little lead pencil marks are, wouldn't you call that a mountainous country up there?

A. Oh, yes, that would be considered a mountainous country.

Q. There would not be any doubt about that, would there? A. No. [509]

Q. Well there is nothing down around that country shown in the white on Exhibit No. 1 which you just examined within the so-called fence lines, which is anything like the country up further, is there?

A. No, it ain't so rough, no.

Q. It is not so rough? A. No.

Q. Wouldn't you call it much rougher up in the northeastern part you pointed out than you would down upon the white part, shown upon the plat?

(Testimony of E. J. De Lano.)

A. Yes, sir.

Q. As I understand it, you would call the north-eastern section a mountainous country, and what would you call the white part as shown on the plat?

Mr. DENMAN.—He has not said that he called it a mountainous country yet.

Mr. PLATT.—I think the record will establish that.

WITNESS.—Well, in fact Squaw Valley is surrounded by mountains, it is a basin down in there.

Q. Oh, Squaw Valley is surrounded by mountains, is it? A. Yes.

Q. And is it surrounded in the northeast as well as any other place?

A. Well, of course my term of mountain and yours may be different.

Q. Now, you called them mountains, I didn't call them mountains. Do you want to retract your testimony, and correct it? You said they were mountains.

A. No, they are mountains, I stick to it.

Q. They are mountains, there is no question about it; and they are mountains up here in the blue which you came to the map and indicated yourself?

A. They are all mountains.

Q. You understand that, and there is no question about it, I just want the truth.

A. It is all a mountainous country. [510]

Q. Now, I will repeat the question which I just asked you. You say that this country up in the north-east is all a mountainous country; now, I ask you

(Testimony of E. J. De Lano.)

what kind of a country it is down here upon the lands shown in the white, between Rock and Willow Creek?

A. That might be considered a foothill country.

Q. That is a foothill country? A. Yes.

Q. Now, let me get you right: The part in the white upon the plat you consider a foothill country?

A. Well, it is pretty hard to describe, but I guess it would come in there under that pretty well.

Q. And the part up here in the northeast in the blue is a mountainous country?

A. Yes, a mountainous country.

Q. Now, you had never been in that section of country, had you, before November, 1911? A. No.

Q. That was your first trip in through there? Now, you did not follow any stock trails clear to the top of the mountain did you? A. No, sir.

Q. You don't know whether the stock trails began from the northeast or ended at the northeast, do you?

A. I could not know whether they went over the mountain, but it is plain enough to see that stock could range all over that country up to the top, plain enough to see that.

Q. How far within the top of the country did you go? A. Within a half a mile, I guess.

Q. And you examined the trails to that extent?

A. One naturally would crossing the country.

Q. Now, you don't know as a matter of fact, do you, whether it was possible for any cattle to come in from a northeasterly direction and go down into this country, do you?

A. I don't know whether they were on the other

(Testimony of E. J. De Lano.)

side of the mountain at all. [511]

Q. And you didn't see any trails, or anything like trails, which would indicate that cattle came from the northeast over the mountain?

A. I would naturally expect they did, because there was passes through there that you could get through.

Q. You understood my question, didn't you; I ask whether you saw any trails, or anything like trails, that would indicate that cattle came over the mountain?

A. There were trails there where they came, only I didn't follow them up to see.

Q. As a matter of fact, you saw trails along the slope, didn't you?

A. I didn't follow them up to see where they were, a man naturally crossed trails wherever he was going in that country, it was a stock country.

Q. These trails were on the mountain or hillsides that you saw?

A. Yes, naturally would be, because I was on the hillsides myself.

Q. I just want to know where you actually saw the trails, that is all. A. Yes, sir.

Q. Had you ever had any experience as a chainman before, Mr. De Lano? A. I had; yes, sir.

Mr. LEWERS.—He didn't say he was a chainman.

Mr. PLATT.—I may have used an inappropriate term there, but you were an assistant to the engineer?

A. I never carried what was called a stadia rod, that was my first experience with that.

Q. Now, this point to which your attention was

(Testimony of E. J. De Lano.)

called on the plat, Defendant's Exhibit "A," and it was pointed out to you as a barrier, and you replied that you didn't know whether it was a barrier or not?

A. Well, it has nothing there to—

Q. Just a moment, I am making this explanation so you will understand the point to which I am referring. This so-called barrier [512] is in section 3 and 4, township 40 north, range 49 east. Now, will you tell the Court just how close you were to that barrier. A. You mean that shading on there?

Q. Yes.

A. Oh, I was probably within 300 or 400 feet of it, I guess, 500 feet, somewhere like that.

Q. Well, there is no question but you were that close to it, is there? A. No, I don't think so.

Q. And what did you see there?

A. Well, just natural rolling hills, as you find on the side of a mountain. It is hard to come in here and describe a mountain, you know, because they are all kinds of shapes and forms and contour, and everything else.

Q. How much of a mountain was there?

A. Not very much of a mountain; they call it a mountain, that is about all.

Q. It was enough to be called a mountain, was it?

A. Yes.

Q. You would call it a mountain and not a hill?

A. Yes, I would call that a mountain range through there.

Q. You would call that kind of country, as I understand it, through there, a mountain range?

(Testimony of E. J. De Lano.)

A. Yes.

Q. Now, you never saw North's or Noble's fence did you before you made this trip? A. No.

Q. Of course you don't know when this fence blew down or fell down, or whether it was torn down, or how it came down? A. No, sir.

Mr. PLATT.—That is all.

Redirect Examination.

Mr. LEWERS.—(Q.) Taking this point near the corner of Nelson's fence as your base, did you see anything rising above that, high enough above it to call it a mountain?

A. I consider that was up on the mountain then.

Q. I will ask the question in another form: Assuming that was [513] level there, did anything rise high enough above it to be called a mountain in that territory? A. Not that I know of.

Q. What is the shape of that hill up beyond the north end of the Noble fence?

A. Well, that is pretty hard to describe.

Q. Well, generally?

A. Same as the other little ridge, ridge all over the mountain is about all, I could not describe it any other way.

Q. Could cattle pass over it?

A. Yes, sir, no question about it; if they was up to the top, as I said, but I don't know what it is on the other side.

Q. Now, you say that you saw trails running all over that country; did any of those trails that you saw run toward what is marked as a hill in section 34

(Testimony of E. J. De Lano.)

from the direction of any of the creeks?

A. Well, now, I could not swear to the course of any of those trails, all I know there is trails all over that country wherever we went, stock trails, but as to their course, I could not swear to that.

Q. What was the vegetation on that ground there?

A. Sagebrush, as far as I could see.

Q. Any bunch grass?

A. Occasionally a little grass, saw some.

Q. And you were there in what month?

A. November.

Q. Was there any snow on the ground at that time?

A. Very little on the north side of the hills.

Mr. LEWERS.—That is all. [514]

[**Testimony of Harry Petrie, for the Defendant.**]

HARRY PETRIE, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. Your name is Harry Petrie? A. Yes, sir.

Q. What is your present occupation?

A. Manager of the Golconda Cattle Company.

Q. Have you had any experience in the stock business? A. Yes, sir.

Q. How many years?

A. Oh, more or less for 25.

Q. How long have you been manager of the Golconda Cattle Company? A. Since July 1st, 1911.

Q. Have you ever been out into the country inclosed by Rock Creek, Toejam Creek, Willow Creek and Siawappe Creek? A. Yes, sir.

(Testimony of Harry Petrie.)

Q. When did you first go out there?

A. About the 18th or 20th of June, 1911.

Q. Where did you go at that time?

A. I went up Rock Creek and up Toejam, and down Siawappe, and down Willow Creek.

Q. Have you been there since?

A. I have.

Q. When were you there?

A. Sometime in October. Well, I was there in July, prior to that, about the 23d of July, and sometime in October, and again a couple of weeks ago.

Q. Were you on this party of four or five gentlemen, including Mr. Button, Mr. Lamb, Mr. Lewers, and others? A. I was.

Q. That went up there about two weeks ago?

A. Something like that.

Q. Now, coming along the Willow Creek country, you know where the dam is there, do you not?

A. Yes, sir; I do.

Q. Was there any opening in the side of the dam?

A. A wing. [515]

Q. What is that opening in, a fence there?

A. It is an opening in the fence.

Q. I call your attention to Exhibit No. 1 and Exhibit "A"; where, with reference to the lane shown on the map, was the opening to which you have just referred as being a lane.

A. There (indicating).

Q. That is at what is called Opening No. 7, of 100 feet? A. I judge it to be about 100 feet.

Q. Is that the opening you are referring to now?

(Testimony of Harry Petrie.)

A. That is the opening I am referring to.

Q. That is what you call a lane? A. Yes.

Q. How did you come along there?

A. Came along in a rig, a buggy.

Q. On the road?

A. On the Elko road, the Tuscarora road, rather.

Q. Did the road pass through the lane?

A. It did.

Q. Where did you go then?

A. Went on up along the road, on up Willow Creek.

Q. How far did you go up Willow Creek?

A. What time was this?

Q. Well, say when you went there in the spring of 1911.

A. Well, I was up there before I made the other trip, but only to a point about here, just above the dam.

Q. What point is that?

A. That is a half a mile opening in the fence along Willow Creek.

Q. That is opening called Opening No. 6 on the map here; is that what you pointed to?

A. This is the opening right here, yes, No. 6.

Q. When did you come there the next time?

A. The first trip up this far was in April, sometime, I don't remember the date. [516]

Q. What was that opening there then?

A. I could not say, I only went to about this point; I don't know at that time about that.

The COURT.—(Q.) Was that April, 1911?

(Testimony of Harry Petrie.)

A. April, 1911, yes, sir.

Q. When was the next time you went there?

A. That was about the middle of June, 18th or 20th of June; I went this other way through Rock Creek.

Q. Clear around back to that point?

A. Made a circuit of that country, Rock Creek, Toejam, Siawappe, and Willow Creek.

Q. Did you come to that opening on that trip?

A. Passed that opening, yes.

Q. Was it then you discovered the opening you described?

Mr. PLATT.—I object again to all these leading questions.

Mr. DENMAN.—(Q.) What did you see at that time at that opening as to the width?

A. It is about a half mile opening; I don't know definitely the width of it; I judge it to be about a half a mile.

The COURT.—(Q.) What opening does that refer to, No. 6?

A. No. 6, yes.

Mr. DENMAN.—(Q.) Now, following along this map towards the north from this opening to a place in section 8 of township 39 north, range 49 east, marked on the map "Opening No. A," did you reach that point on your trip in June? A. Yes, sir.

Q. What did you find there?

A. Found an opening there of approximately 300 feet.

Q. What can you say of the character of the

(Testimony of Harry Petrie.)

country there on each side of that opening, the natural objects and other things that you saw?

A. Well, there is a spring with a few cottonwoods just northwest of the opening, the creek lies just east of it; [517] the country is a rolled and broken country, very rocky.

Q. Where do those rocks lie?

A. They are scattered promiscuously over the ground.

Q. And any in the opening itself? A. A few.

Q. How large? A. Oh, the rocks vary in size.

Q. In the opening, I am speaking of now, at A?

A. They are small rocks, size of a cuspidor, or as small as a hen's egg, just a rocky surface.

Q. Did you, at that point, take a look to the north-easterly?

A. We stopped and ate our lunch there, and drove in there with a buggy; stopped there and ate our lunch and sized the country up generally.

Q. Did you look in a general northeasterly direction at that time?

A. Yes, I looked the country over generally when I drove in there, never been there before.

Q. Now, let me ask you as to your last trip that you made in there with these other gentlemen. Did you arrive there at that same point on this last trip?

A. I did.

Q. And did you, on that occasion, look in a general northeasterly direction from that opening?

A. We travelled northerly from there.

Q. Did you look across the country which is

(Testimony of Harry Petrie.)

marked on here by an object like a caterpillar, and running in a general northerly and southerly direction, in the southwest quarter of section 4, and the northwest quarter of section 9; did you look in that direction? A. Yes.

Q. What did you see in that direction?

A. I saw a country of rolling hills.

Q. Did you see anything that corresponded with that caterpillar-like object drawn on the map?

A. No, I did not. [518]

Q. What can you say as to the country, as far as its possibility or availability for the passage of stock in the direction of westerly from easterly, across where this caterpillar-like object I described lies?

Mr. PLATT.—Same objection, if the Court please, to this line of questioning, and I suppose the same ruling.

The COURT.—The same ruling, and same exception.

Mr. DENMAN.—(Q.) What did you see?

A. I saw a rolling country, as I have described, and some draws, some hills, some smooth, some more or less rough. The bulk of this country through here—

Q. Just a moment. I am confining my question to what you saw as you looked across this country you have described as having the caterpillar-like drawing; what would you *saw* as to that country with reference to the possibility of stock passing over it from the west to east?

A. No possible obstruction there, in my judgment.

(Testimony of Harry Petrie.)

Q. How far can you see in that direction?

A. Well, I don't know; you can see a long distance, several miles, perhaps.

Q. Now, continuing further north, where did you go to as you followed up Nelson's fence?

A. We went beyond the westerly end of the fence, and turned across through this country, westerly.

Q. Now, I will ask you when you got to the head of Nelson's fence, on exhibit "A"—and looked in a general northeasterly or northerly direction, what did you see?

A. A rolling country there, hills and openings.

Q. How far north could you see looking from that point?

A. Oh, I judge a mile perhaps, possibly more.

Q. This was a country you described as having a rolling aspect? [519]

A. Rolling hills, hilly country.

Q. Did you see anything in that country which corresponds to this snake-like drawing marked on Exhibit No. 1 as "Toejam Mountain," running from a point in section 32, and touching apparently a fence line there to the easterly from there; did you see anything that corresponded to that as you looked in that direction?

A. Well, I really don't know just what that is made to represent.

Mr. PLATT.—You don't know whether that is a snake or not, do you?

A. I can describe the country there as it is, but what that is made to represent, I don't know.

(Testimony of Harry Petrie.)

Mr. DENMAN.—(Q.) Did you see anything there in the nature of a ridge or change of elevation, that ran in that direction I have described, which could be demarked from the rest of the country?

Mr. PLATT.—Object to the question as being absolutely leading.

The COURT.—Let him tell what he saw there.

Mr. DENMAN.—(Q.) What did you see there?

A. Well, directly east—

Q. (Intg.) Looking north now across from here, and Toejam Creek to the north.

A. Well, as I have stated before, I saw rolling hills, on the westerly part is a small butte of brown rock and a gap in between, lower end, then a ridge that bore in further to the southeast, and the country generally is smooth; that is a grass country, largely.

Mr. PLATT.—I ask that part of the answer be stricken out as not responsive, the country being a grass country.

WITNESS.—I was trying to describe the nature of the country.

The COURT.—I will let that stand.

A. (Contg.) Because the portion of the country is a grass country, and this butte, as I indicate it, is along Toejam, just at the turn. [520]

Q. (Mr. DENMAN.) You just pointed to the butte, marked "Small Hill" under the figures 32?

A. Yes.

Q. Describe that butte.

A. To the right of that is a sort of lower depression in the mountains, sort of pass; further on is a higher

(Testimony of Harry Petrie.)

mountain to the north, which would correspond very well to the course of this stream along here, range of broken hills in there.

Q. I call your attention to a place marked "Hill" on this map (Defendant's Exhibit "A"); did you look in that direction?

A. Yes, I looked in every direction.

Q. What did you see in that direction; that is to say, from the northeast, from the north point of Nelson's fence?

A. I saw a rolling range of hills, sloping to the south.

Q. Let me ask you as to the character of the country as you looked north, between the hill in section 34 and the small hill in section 32, a distance on the map of about a mile and a half, did you see in there, or is that the country you just described?

A. That is the country I just described, with the exception of the valley that runs on into Toejam, is a slope, and a rise into these hills I have described, and in through there there is a lower country than over here, with a sag in the hills, a depression.

Q. You have just put your finger on the dotted line running from the fence easterly towards this hill, that is correct, is it not?

A. Yes, my impression is, though, it is farther away.

Q. Now, did you go to the point marked by the arrow at the westerly end of this Opening No. 5, where it touches a fence marked "North's fence"?

A. I did.

(Testimony of Harry Petrie.)

Q. Did you look from there in a northeasterly direction, to the north of this hill in section 34?

A. Yes, I looked over all that country to the north and east.

Q. Tell what you saw of the country between the hill in 34 and [521] to the northerly thereof towards Toejam Creek.

A. Well, I saw a range of hills as I described before.

Q. What character of hills?

A. Rolling hills, grassy hills.

Q. What can you say as to that country, with regard to its passability for stock?

A. No possible obstruction that I saw.

Q. How far could you see in this direction I have described to the northerly of the hill in section 34, looking in an easterly direction, from where you stood at this point?

A. Well, several miles, I don't know how far, possibly two or three, possibly farther.

Q. Did you see anything as you looked in that direction that in your opinion would stop the passage of cattle? A. I did not.

Q. Coming to this fence called North's fence, to the point I have just described, that you stood at, at the westerly end of the opening, and where the point of the arrow touches the corner of the fence, where did you go from there?

A. We first followed along the south side of the fence, then crossed through an opening, went inside of the fence, rode a little ways, crossed through an-

(Testimony of Harry Petrie.)

other opening, and went outside, and followed on around the hill until we came to, nearly to Toejam Creek, went through an opening there. crossed the creek, and on below.

Q. When was the first time that you passed by that fence? A. Which part of it?

Q. Any portion of it?

A. About the 18th or 20th of June, 1911.

Q. Describe the condition that you found that fence in.

A. You are referring to the north fence?

Q. Yes.

A. Well, it was down at this point right here, at that time; I didn't go along at that time all this fence; I came around here and struck the fence at about this point, in June. [522]

Q. That point you have described is a point marked "195" there?

A. About there, just a short distance from the corner.

Q. What condition did you find it in?

A. The fence was down, in bad shape; good many posts knocked down, wires down.

Q. When you say "knocked down," what do you mean by that?

A. Probably knocked down by the wind, rotted off, or something of that sort; I don't know what put it down, but I judge age more than anything else.

Q. Describe the condition of the wires on the fence at that time at the point where you saw it, the character of the wire first.

(Testimony of Harry Petrie.)

A. Well, it was a black barb wire, very old, apparently, never been galvanized.

Q. About Opening No. 6, will you describe the condition of the country in the immediate vicinity, say within a distance of a mile, with reference to the topography of that neighborhood?

A. A mile either way?

Q. Well, a mile, say, to the south first.

A. Well, along here is a range of hills; this course along the creek necessarily is a valley, right about this point is bare ground, everything is worn off, it has been used for a long time, apparently, to work cattle on; the—

Q. What can you say—

Mr. PLATT.—Let him go on and finish. I thought you had not finished your answer.

A. Well, I had not finished. I was going to describe the country on both sides of the creek, if you wished it.

Mr. DENMAN.—Yes, if you will.

A. That is the valley here along which the Tuscarora road runs, and here is a stream, and beyond is the rolling hills, smooth, [523] though covered with sagebrush.

Q. How far is the creek from the opening?

A. Oh, possibly 200 yards; I never noticed especially, two or three hundred yards.

Q. What can you say as to the topography of the country leading from the hills into that opening?

A. I don't quite understand your question.

Q. What can you say as to the topography of the

(Testimony of Harry Petrie.)

country leading from this low line of hills from the south into the opening, or between the hills and the opening?

A. This is the valley here along Willow Creek, Willow Creek valley; the road runs right in the valley, and then off to the south are these low hills.

Q. Any openings in the hills north and south?

A. Yes, there is a number of little draws, naturally work toward the stream, and of course this Hot Creek is quite a stream, and has its branches; then there are other little dry draws and runs that work down towards the creek.

Q. Did you ever pass through that country in company with Messrs. Melrose and Flocker?

A. Yes, sir.

Q. And when was that?

A. About the 23d of July, 1911, 22d or 23d, I think.

Q. Pass clean around the fence with them?

A. From the Dutton postoffice up Rock Creek; up Toejam, across Siawappe, down Siawappe, down Willow Creek, and to our starting point.

Q. How did you travel on that occasion; what did you have?

A. We had a Studebaker wagon, two-seated wagon, spring wagon.

Q. You say you travelled along Toejam Creek, and came from there up across and down Siawappe?

A. Yes.

Q. How far along the north side of Toejam did you run before you turned to come in a southeasterly direction? [524]

(Testimony of Harry Petrie.)

A. We didn't run along the north side at all, we drove along the south side.

Q. I mean along the north side of this map; you drove along the south side of Toejam Creek?

A. South side of Toejam Creek.

Q. Where did you leave the creek to come in a southeasterly direction?

A. We left the creek about here, I think (indicating). Mr. Flocker stayed in the wagon, and Mr. Melrose walked the fence; we drove around and struck the North fence right near the—no, we didn't go over the fence, but we came very near the fence, the side of the fence.

Q. Where did you go then?

A. Then we drove to a point across here, to about here (indicating).

Q. How far is that from the spring and the quaking-asps?

A. I don't remember; I took sort of a circuitous route around this way with the wagon, about a mile, I should judge.

Mr. PLATT.—Let me understand; did you drive alone, or who drove across the country?

A. I drove from this point I am describing to the spring, where we ate lunch, Melrose and Flocker walked. Flocker rode with me around this country, while Melrose walked. I have since driven it, however.

Q. As I understand, on that trip across that country you went alone, didn't you?

A. Which part of it?

(Testimony of Harry Petrie.)

Mr. DENMAN.—If you will permit me to conduct the examination.

Mr. PLATT.—I just wanted to understand what he said. He said we drove.

The COURT.—Read the question.

(The reporter reads the record.)

Q. Mr. DENMAN.—Now, whereabouts did you last see Mr. Melrose in that country?

A. Well, we picked Melrose up about this point about the end of the North fence, southeast corner of the North fence, possibly. [525]

Q. Would you say directly above the word “six”?

A. No, there is the corner right there, at that opening.

Q. At the west end of the arrow point?

A. At the west end of the arrow point, southeast corner of the fence.

Q. Where did you go with him then?

A. We drove, as I have described before, across this country here to a point somewhere here, and struck the Nelson fence.

Q. Were Mr. Flocker and Mr. Melrose with you on that drive?

A. They were on the drive from the North fence to where we struck the Nelson fence.

Q. Did either of them leave the wagon during that trip across there?

A. In across here, they both left it at this point described, I don't know the section line.

Q. That is to say, at about the—

A. (Intg.) At a point on the Nelson fence some-

(Testimony of Harry Petrie.)

thing like a mile from the spring where we ate our lunch.

Q. About a mile from the point where you ate your lunch. Where did they go then?

A. I presume they walked this fence, they said they did. I drove around, and we ate lunch together at the clump of cottonwoods, at the spring at the bend of Siawappe Creek.

Q. How long did it take them to walk that fence?

A. I don't remember that, only a short time.

Q. Ten or fifteen minutes?

A. Something like that.

Q. Then you met at the spring?

A. Ate our lunch at the spring.

Q. So on that trip you never got above this point on Nelson's fence, about a mile above the spring?

A. Yes, I would judge it about that.

Q. And you drove directly across the country from the west [526] point of the arrow down through that point here?

A. We drove across something that direction.

Q. You have since driven over it; with whom did you drive over it?

A. I drove over it with Mr. William Denman and a man by the name of Thornton, Mike Thornton.

Q. And you have driven over it since that time, or ridden over it?

A. Rode over a portion of it horseback, of that country horseback, and the rest of it in a machine, automobile.

Q. There has been testimony that you received a

(Testimony of Harry Petrie.)

telegram from William Kent sometime along in the latter portion of May or the first portion of June, 1911; did you receive a telegram from him at that time? A. I did.

Mr. PLATT.—I object, if the Court please, unless I know the purpose of the question.

Mr. DENMAN.—I simply want to show the date of the receipt, so we can fix the time at which these additional openings were made. For the purpose of fixing the time. Withdraw the question.

Q. Did you ever have any conversation at about the time I have indicated with Mr. D. P. Osborne, concerning the making of holes in any of these fences in this country here?

Mr. PLATT.—I object on the ground it is incompetent, irrelevant and immaterial, has no bearing upon any of the issues involved in this case; and further, it has not been shown that any conversation which might have been had between these people could in any wise be a conversation which would bind the defendant company.

The COURT.—Is it to any further issue than to fix the dates?

Mr. DENMAN.—That is all.

The COURT.—I will allow it to be put in; but, as I stated, I don't think the question of intention cuts very much of a figure [527] in the decision of the case. My purpose was, however, to let you introduce that testimony, in order that you might make your point, if you feel my ruling is not correct in that matter.

(Testimony of Harry Petrie.)

Mr. DENMAN.—This is to fix the time at which these openings were made.

The COURT.—I will let the testimony in, and a motion to strike out may be made later. Proceed.

Mr. DENMAN.—(Q.) Did you have a conversation with D. P. Osborne, the latter portion of May or the early portion of May, 1911, concerning the opening of gaps in any of these fences? A. I did.

Mr. PLATT.—I ask for the benefit of an exception on the grounds stated.

The COURT.—I have not admitted the testimony yet. After we are through with this you may move to strike out such portions as you like, and then take the ruling, or if you prefer to have a double ruling now.

Mr. PLATT.—No, I do not desire that.

Mr. DENMAN.—(Q.) What was that conversation? In the first place, what was the date of that conversation?

A. About the last of May, 1911, either the 30th or 31st day of May.

Q. How do you fix that date?

A. By a telegram received.

Q. Have you got that telegram with you?

Mr. PLATT.—Now, if the Court please, I ask the question be stricken out on the ground it refers to a conversation subsequent to the time of bringing this action, and could therefore have no bearing on the issues involved in the case.

Mr. DENMAN.—I will show that the conversation

(Testimony of Harry Petrie.)

occurred on May 30th, and the telegram was received on that day.

Mr. PLATT.—I am making the additional objection, if the Court [528] please.

The COURT.—Very well.

Mr. DENMAN.—(Q.) Have you the telegram with you?

A. I am afraid not; I have a lot of papers at the hotel, and I am afraid it is with them.

Q. Can you get it? A. Yes, I can get it.

Q. Well, I will call the witness later on this point. Do you remember the date of that telegram?

A. I remember the date of it, May 30th.

Mr. PLATT.—I object to the date of any written instrument; if they are going to offer it in evidence, the date is the best evidence.

Mr. DENMAN.—That is a fair objection.

Cross-examination.

Mr. PLATT.—(Q.) Now, you are the manager of the Golconda Cattle Company, are you not?

A. I am; yes.

Q. And you have been manager since July 1st, 1911? A. July 1st, 1911.

Q. And the first time you ever went upon the country, or visited the country as shown upon both exhibits, was June 18th or 20th, 1911?

A. All the country, yes, that I described, and my trip over a portion of it, as I stated, in April.

Q. Generally speaking, what portion did you visit early in April?

A. From the Dutton postoffice to a point about

(Testimony of Harry Petrie.)

two miles above the dam, a distance of about 14 miles.

Q. Well, it was along Willow Creek, wasn't it?

A. Up Willow Creek, yes.

Q. Did you make a visit in November, 1911?

A. No, I think not, I think it was October. [529]

Q. In October, 1911?

A. That is my recollection, yes.

Mr. DENMAN.—May I ask a question at this point? (Q.) That was the visit you made with me in October?

A. Yes.

Mr. PLATT.—(Q.) Prior to your visit in October, 1911, did you make a trip around this fence as shown upon the plats, with a view of ascertaining the character of the so-called inclosure?

A. No, that was not the purpose of my trip.

Q. Well, prior to your visit in October, did you ever make any trip with a view of ascertaining as to the general character of this so-called inclosure?

A. No, I don't think that was ever the purpose of my trip.

Q. What was the purpose of your trip?

A. Why, my first trip in June, 1911, was to ascertain the nature of the country, and the condition of the fences, and so forth.

Q. Now, then, in June, 1911, was the first time you made a trip for the purpose of ascertaining the nature of the country, and the condition of the fences?

A. As a complete whole; I had been through that tract of land, but on other business, but never had covered the whole territory.

(Testimony of Harry Petrie.)

Q. And never before that time had you made a trip for that purpose over the whole territory?

A. No.

Q. Now, before June, 1911, had you any accurate knowledge as to the actual number of gaps in the so-called inclosure? A. I had not.

Q. You had not? Then every bit of knowledge which you acquired, that is, accurate knowledge, concerning that inclosure, was acquired after, sometime after June, 1911?

A. It was after my first trip, yes.

Q. What generally, Mr. Petrie, is the character of the country outside of the so-called inclosure, and south of Willow Creek? [530]

Mr. DENMAN.—Object to that on the ground that in so far as it extends to the west of Hot Creek it is not proper cross-examination, we have not touched that.

The COURT.—The objection will be sustained so far as the question applies to any territory more than a mile west of Opening No. 6.

Mr. PLATT.—You insist upon that objection?

Mr. DENMAN.—I don't want to open up the whole case.

Mr. PLATT.—(Q.) What is the character, general character of the country, if you know, Mr. Petrie, northwest and north of the northwesterly and northerly line of this so-called inclosure?

Mr. DENMAN.—That question is not cross-examination.

Mr. PLATT.—I take the ruling of the Court.

(Testimony of Harry Petrie.)

The COURT.—I will allow it.

A. That is a hilly, mountainous country, rolling hills both northwesterly and north.

Mr. PLATT.—(Q.) A hilly, mountainous country?

A. Well, so-called here, yes, mountainous; it is comparatively smooth, rolling hills all through that section.

Q. You say it is a hilly, mountainous country, then you say it is composed of comparatively smooth hills; now, which do you mean?

A. Well, I mean comparatively smooth hills. If you give me the opportunity I will explain my reason for making that remark.

Q. I want to know.

A. It depends entirely where a person has been most of his life what he considers mountainous, that is the point.

Q. Do you think in the parlance of this country, when you said that was hilly, mountainous country, it would so be considered in Nevada?

A. Well, not extremely mountainous, no; it is a country of rolling hills, some of them may be large enough to be called mountains in Nevada, they would not be where I came from. [531]

Q. Do you know the distinction between extremely mountainous and mountainous? A. I think I do.

Q. Then they might be called mountainous but not extremely mountainous?

A. Well, possibly; that depends, of course, upon the party designating their character; I think that has a great deal to do with it.

(Testimony of Harry Petrie.)

Q. What would you say as to this section of country up in the northeast here, indicated in the blue upon the plat?

A. That whole section north of those streams is very similar there, rolling hills, and mountains perhaps, to some people, not to me, anyway.

Q. Would you call that a hilly, mountainous country?

A. Along about the same line as the other, for the same reasons, yes. It is a country of rolling hills.

Q. Now, let me ask you, Mr. Petrie; as a matter of fact, is it not more hilly and mountainous up in this northeast section than it is several miles back here, along the northerly border line?

A. That is true as regards a portion of the country, but untrue as regards the other; certain sections in that country quite as rough as this is, I think even more so.

Q. You think there are certain sections north of this section that are quite as rough as the section in the northeasterly corner of the plat?

A. Yes, I think more so.

Q. You think more so?

A. Yes. I can designate the country, if you wish.

Q. I wish you would.

A. That is the country lying directly north, where Walker's fence extends on; the map is not large enough.

Q. What do you mean, the north fence?

A. Yes, we call this the Walker field. This is lambing country [532] up here of Noble's, and it

(Testimony of Harry Petrie.)

is a summer range for cattle; this whole country at the head of these streams. Right in here towards the head of Trout Creek is a pretty rough country, however, cattle range back and forth onto the desert, and both ways, continuously.

Q. No question about cattle ranging over that country to the north, is there?

A. Are you addressing me?

Q. Yes. A. No, sir, none whatever.

Q. You are pretty well satisfied that cattle can range on the outside of this so-called inclosure to the north, quite freely?

A. Range all over this entire country freely, the part I have been in, and I have covered this entire part, up all through here.

Q. And they could range along the northwesterly line quite freely on the outside?

A. No question about it.

Q. And sheep likewise?

A. No question about it.

Q. And I now repeat the question, could they range southerly from that line quite freely?

A. What point, all of it?

Q. Yes. A. No, cannot all of it.

Q. What parts can't they?

A. Down in this section is a big mountain range with an opening that Rock Creek passes through; there is a little obstruction on through this territory here in the way of mountains, until you come to these streams that run on, they run into Willow Creek, many of them are not shown on this map because

(Testimony of Harry Petrie.)

they are dry part of the season.

Q. Do you know the name of those mountains?

A. No, I have not heard that called.

Q. Did you ever see any cattle or sheep grazing within this so-called inclosure on any of your trips?

A. Yes, sir, lots of them.

Q. About how many head? [533]

A. Both, referring to cattle or sheep?

Q. Cattle and sheep.

A. Well, I saw, presumably, 10,000 in one day in here, in either April or May, 1911.

Q. What were they, cattle or sheep?

A. Those were sheep that I speak of.

Q. Do you know what they were eating?

A. Why, they were eating a little, a few weeds of various kinds, and some grass; there is a weed there, I don't know the name of it, I can describe it to you; it is not much of a bottom, however there is a variety of weeds in there up through this section; down here, I have never seen any sheep in this lower part, but over here in that valley, right on the stream.

Q. But there is no question about your seeing them upon this land shown in the white, is there, within the inclosure?

A. No, sir, no doubt about it at all.

Q. How much higher in elevation, if you know, is this section of country up in the northeast corner of the Government's plat, as compared with the southwest section of the plat?

A. Well, sir, I could not tell you, I don't know what the fall of that stream is; that distance there

(Testimony of Harry Petrie.)

is about 12 or 18 or 19 miles.

Q. Which way from those does Rock Creek and Willow Creek run?

A. Rock Creek runs southwest, Willow Creek takes a good deal the same course, as shown here.

Q. That is, the source of those creeks, as I understand it, is up in this direction, in a northeasterly direction?

A. Not of Rock Creek, no—well, yes, Rock Creek heads back here; it runs up this way and circles around through that country, inside of the north fence, or the Walker field as we call it.

Q. As a matter of fact, the sources of these creeks are up in [534] the mountains, is not that true?

A. Yes, it is always true.

Q. And how about Willow Creek,—does the same apply to that?

A. Well, Willow Creek heads farther east than the others, a little bit; it is over south of the Tuscarora country.

Q. Do you know when Opening No. 6 upon the plat was made? A. I do not.

Q. Do you know when Opening No. A was made?

A. I do not.

Q. Do you know when any of the openings were made?

Mr. DENMAN.—Where?

Mr. PLATT.—In the fence?

A. Not as to the exact date, no.

Q. Well, have you any knowledge as to when any of them were made, approximate dates, I mean—I

(Testimony of Harry Petrie.)

mean accurate knowledge as having been there, and being able to testify about it.

A. You have already asked that question. My first accurate knowledge was about the 18th or 20th of June.

Q. I am just asking you specific questions now as to these various gaps. As I understand it, you have no accurate knowledge?

A. If accurate knowledge is necessary that I should have been there, no; otherwise, yes.

Q. Well, can you testify upon oath as to any approximate dates when any of the gaps as indicated upon the plats were put in that fence?

A. Now, in order to do that what knowledge is it necessary for me to have? I want to know just the situation.

Q. Well, you are on the witness-stand, Mr. Petrie, I am leaving it to you; can you testify on oath?

A. Well, I want to find out the question before I answer it.

Q. Can you testify upon oath as to an approximate date or dates of your own knowledge, as to when any of those gaps were put in that fence? [535]

Mr. LEWERS.—May I ask whether that excludes hearsay?

Mr. PLATT.—Why, certainly it excludes hearsay.

A. I have already answered that question.

Q. So far as your knowledge is concerned, that includes what somebody else told you?

A. Certainly.

Q. Well, that is not absolute knowledge. Do you

(Testimony of Harry Petrie.)

remember whether Mr. Flocker got out of the wagon and went over here to Opening No. 6 to measure it?

A. I don't think he did; he might have, but my recollection is that Mr. Melrose did that work, and Mr. Flocker sat in the wagon near there where I turned the team around, there is a spring in there, and they fed right at that point, and I turned in there and drove around, and they walked down the fence, as I recollect it.

Q. Did you see Mr. Flocker measuring Opening No. 6?

A. I don't remember that he did measure it; I don't remember seeing, or as to whether he did or not; I remember Melrose walking across Opening No. 6.

Q. You don't remember whether Flocker did or not, is that true?

A. No, not definitely; I don't remember whether he did or not.

Q. Did you notice him measure any of the openings?

A. No, I don't have any recollection of that.

Q. You would not say that he did or did not?

A. I am under the impression I would remember it if he did, but I would not state positively that he did not, because I don't remember the circumstance.

Redirect Examination.

Mr. DENMAN.—(Q.) You say you saw cattle in there in that inclosure in the month of May and June, 1911?

(Testimony of Harry Petrie.)

A. Yes.

Q. How many different brands?

A. I could not say as to that; I could not testify regarding that; I saw cattle but I was not [536] paying any attention to them, because I was looking after the sheep, saw them at a distance, but didn't ride close enough to examine the brand.

Q. Do you know what sheep they were?

A. About this location a man by the name of Nelson had a band of ewes, and he afterwards moved up through this country.

Q. That was that 10,000 sheep you spoke of?

A. No, the Pitchfork outfit had a band right out, had a band right there on the stream, on Toejam, and they ranged both ways in these little hills to the north, and this way.

Q. How about cattle, how many head of cattle did you see in there?

A. I could not state as to numbers; cattle were scattered down through this end of it, and once when I got up here I saw a few at a distance, but I didn't ride through that, I was following lambing camps, going from one lambing camp to the other.

Q. Where were the cattle, on the upland or along the creeks?

A. Some few along the upper part of the edge of these hills, and some along down on this stream, in the lower part, on Rock Creek.

Q. When you were up there in June or July that year, did you see any cattle in there then?

A. I don't recollect seeing any in there, I might

(Testimony of Harry Petrie.)

and might not, I don't remember about that; I remember seeing some through this country up here.

Q. Where is that?

A. Between Toejam and Siawappe, there is a rolling, smooth, grassy hill along here, little valley, then there is a rise to these high hills beyond; they were in the valley and on the side of that.

Q. Where is it with reference to Opening No. 5 marked by the arrow point from here to here?

A. Well that is the corner fence, I think we were about there when we stopped, and I called [537] attention to cattle here, and beyond, a few head there, possibly 10 or 12.

Q. How far off were they?

A. Oh, half a mile to a mile.

Q. What direction? A. Northeast.

Mr. DENMAN.—Take the witness.

Recross-examination.

Mr. PLATT.—(Q.) Where do the high hills rise beyond northeasterly from where you pointed?

A. Where?

Q. You spoke about a rise to the high hills beyond; how far from the southeast corner of section 6, township 40 north, range 49 east, in a northeasterly direction, do the high hills rise beyond?

A. You misunderstood me; right there, begin about this place (indicating).

Mr. DENMAN.—You are pointing now to what, to the northeast quarter of section 5?

A. I would say that is about the location.

Mr. PLATT.—I don't think I misunderstood your

(Testimony of Harry Petrie.)

testimony. Didn't you testify there were high hills rising beyond?

A. Beyond what?

Q. Beyond the point from which you stood?

A. Yes, but I say that is the point.

Q. What is the point?

A. Point about there, in that northern part of section 5; I never testified as to that point.

Q. I am asking you now whether you know how great a distance it is from the southeast corner of section 6, township 40 north, range 49 east, to the high hills to the northeast?

A. To go across that section, I would have to add a little over a mile to it; my other testimony was probably about a mile.

Q. I don't want you to misunderstand my question. A. I don't want to. [538]

Q. You understand it, don't you?

A. I think so; repeat it.

Q. I ask you how far it is from the southeast corner of section 6, township 40 north, range 49 east, in a northeasterly direction before you strike the high hills beyond.

A. Possibly a little over two miles, approximately two miles.

Q. And there is no question about that in your mind, is there? A. I don't think so; no.

Q. Do you know whether the cattle and sheep you saw grazing within this inclosure you observed before or after this suit was brought?

Mr. DENMAN.—Just give the date of the suit.

(Testimony of Harry Petrie.)

Mr. PLATT.—State the month and the year in which you saw the cattle and sheep grazing within that inclosure.

A. Either April or May, probably the latter part of April, possibly the early part of May.

Q. Of what year? A. 1911.

Mr. PLATT.—That is all.

Redirect Examination.

Mr. DENMAN.—(Q.) When you speak of high hills beyond, where are they with reference to the rolling hills you referred in that same country?

A. Well, they are the same hills; these are high simply because they are a trifle higher as a natural consequence the farther up the stream you go.

Q. When you say “these here,” you refer to the hills in 32 and 33, township 40 north, range 49 east?

A. Right in about that location the country is a little higher than this pass between there.

Mr. PLATT.—What location, just point that out.

[539]

A. I have not stated these township and range numbers; I can indicate what I mean on the map; point about here.

Q. Where Toejam Mountain is represented on the map here?

A. My impression is a little further than that; it is about there, not over half a mile, probably not over half a mile either way from this representation.

Mr. DENMAN.—(Q.) Let me ask you so I won't be confused: Are those the hills you referred to as having been seen by you from the west point of the

(Testimony of Harry Petrie.)

arrow, when you stood at North's fence, is that correct?

A. Those are the hills.

Mr. DENMAN.—That is all. [540]

[**Testimony of Mike Thornton, for the Defendant.**]

MIKE THORNTON, called as a witness by defendant, having been sworn, testified as follows:

Direct Examination.

(By Mr. DENMAN.)

Q. What is your name?

A. Mike Thornton.

Q. What is your occupation?

A. Ranch foreman.

Q. What has your business been for the last ten years?

A. Working with cattle, ranching and stock farming.

Q. How long have you worked with cattle?

A. On and off all my life.

Q. How old are you? A. Forty-three.

Q. How much of that experience has been in Humboldt County? A. About five years.

Q. What is your present occupation?

A. Ranch foreman.

Q. For whom?

A. Golconda Cattle Company.

Q. How long have you had that position?

A. Three years and a half; that is, with cattle and ranch foreman connected.

Q. Are you acquainted with that country which

(Testimony of Mike Thornton.)

lies between Rock Creek, Toejam Creek, Willow Creek and Siawappe? A. Yes, sir.

Q. Driven cattle through there? A. Yes, sir.

Q. Have you ever been in this country shown on this map here, Exhibit "A," as lying between what is called North's fence and Nelson's fence?

A. Yes, sir.

Q. Have you ever been in the country to the north-east of that? A. Yes, sir.

Q. How far have you been to the northeast of there? A. About four miles.

Q. And how far from this corner of Nelson's fence in the middle of the south line of section 33, how far northeast from that? [541]

A. About four miles.

Q. You are familiar with that country in there, are you? A. Yes.

Q. Now, I will ask you, standing at this corner indicated here by the east point of the arrow at this opening, and looking towards a place marked as a hill on the map here, have you ever looked in that direction? A. Yes, sir.

Q. Ever ridden in that direction? A. Yes, sir.

Q. What was your purpose in riding there?

A. Working cattle.

Q. What was your purpose in going 4 miles east of there?

A. Driving cattle out of that country.

Q. When was the last time you were in there?

A. Working cattle?

Q. Yes. A. In April and May of last year.

(Testimony of Mike Thornton.)

Q. 1911? A. Yes.

Q. Did you pass through this opening between North's fence and Nelson's fence at that time?

A. Yes, sir.

Q. Did you gather any cattle there?

A. No, I went out from there looking for beef cattle, on the outside; I drove beef cattle back from there.

Q. For what were you gathering those beef cattle?

A. Golconda market.

Q. How far back did you have to go to gather them?

A. Out on that mountain and back to Rock Creek.

Q. I will ask you to look at this other map up here on which is drawn a long snake-like thing called Toejam Mountain, do you see that? A. Yes.

Q. Did you ever see anything like that in that country before? A. No. [542]

Mr. PLATT.—I submit that is a very unfair question. It has been asked of every witness yet, as to whether he saw anything like that thing on the map up in that country before; and there is not one witness who has been asked that question who knows what the question means.

Mr. DENMAN.—(Q.) Well, Mr. Thornton, when you went back 4 miles into this country on which side of that hill did you pass? A. Both sides.

Q. What can you say as to the character of that country on the north side of that hill, between that hill and Toejam Creek country to the north?

A. Gradual slope.

(Testimony of Mike Thornton.)

Q. What can you say as to its character with regard to the vegetation on it?

A. Good grazing land.

Q. What can you say as to the existence of any obstructions to the passage of cattle in this space between the hill and Toejam Creek to the north.

Mr. PLATT.—Same objection, calling for the opinion or conclusion of the witness.

The COURT.—He can tell what he saw there that would have any tendency to stop or turn cattle.

A. Nothing to prevent cattle going either way, coming or going.

Mr. DENMAN.—(Q.) You say you were in this country in the month of April and May, 1911, and I asked you whether or not you were in the country marked in the white on this map between these creeks? A. Yes.

Q. I ask you whether you saw any cattle in there?

A. Yes, saw cattle in there.

Q. Tell me what brands you saw on the cattle in there. A. I saw "25."

The COURT.—This was in April and May, 1911?

Mr. DENMAN.—Yes, your Honor. [543]

Q. What brands did you see in there at that time?

A. "25," "P. Bench," "C. S.," "S. L.," "Rolling-pin."

Q. What else?

A. Well I don't remember all of them, several different irons.

Q. Now, you said "C. S.," whose brand is that?

A. The Bliss Brothers.

(Testimony of Mike Thornton.)

Q. And where is their home ranch?

A. On the Humboldt, below Golconda.

Q. How many miles away? A. It is 60.

Q. The "P. Bench" cattle, whose are those?

A. Moffatt.

Q. Where is their home ranch?

A. About 40 miles from Dutton.

Q. In what direction? A. North.

Q. Now, the "Rolling-pin," whose brand is that?

A. Fairchild's.

Q. Where is their home ranch?

A. Thirty-five miles from Dutton.

Q. Which direction? A. North.

Q. What other brand did you mention?

A. "S. L."

Q. Who owns the "S. L." brand?

A. Taylor and Reed.

Q. Where is their place?

A. About 40 miles north.

Q. Now, let me ask you as to the passage of sheep through this country. Is there any well-defined line of travel of sheep moving through that district between these creeks I have described; is there any well used line of travel in that country of sheep going through?

A. Yes, they travel all through that country.

Q. What is the regular line of travel, if any?

A. Northeast.

Q. Where did they come into that district?

A. From the west.

Q. Is there any place they come in at? A. Yes.

(Testimony of Mike Thornton.)

Q. Whereabouts? Point it out on the chart here, if you will examine Exhibit No. 1.

A. Right here (indicates). [544]

Q. That is Opening No. 1? A. Yes.

Q. Now, can you tell me how many, if any, bands of sheep passed through Opening No. 1, as far as you know, in the spring of the year 1911?

A. Sixteen, I think.

Q. Sixteen bands?

A. I am not sure of the number, but I should judge about 16.

Q. Does that road pass over the land marked in white here? A. Yes.

Q. I am now referring to the land in sections 34, 35 and 33 in township 39 north, range 47 east. Just come and look, and see if that is the place you referred to. A. Yes, sir.

Q. You say there was 18 bands passed through there? A. Sixteen, to the best of my memory.

Q. To whom did those bands belong?

A. Tom Nelson, Golconda Cattle Company.

Q. Who else?

A. Mostly Tom Nelson's. Well, Stewart, I don't remember him passing through there last year; he passed the year before, I think.

Mr. PLATT.—Well, do you know that he passed the year before?

A. Yes, I know that he passed in 1909.

Mr. DENMAN.—(Q.) In 1909? A. Yes.

Q. That same road? A. Yes.

Q. What other bands passed through there, either

(Testimony of Mike Thornton.)

stopping or passing through, to go beyond?

A. That is all I remember of; I wasn't around there much when sheep were travelling through.

Q. Where were you then?

A. On the river, Humboldt.

Q. Do you know what bands have passed through there in the past?

A. No, not only those sheep I have mentioned.

Q. Do you know of any bands passing through there, going into the higher country on beyond to Tuscarora? A. Nelson's, Tom Nelson's. [545]

Q. How long have you been in there?

A. On and off for two years and a half; I have not been there all the time, you know, on different ranches.

Q. Oh, there is one thing, you were speaking of passing some 4 miles beyond Opening No. 5 in a northeasterly direction in search of beef cattle, what can you say as to any cattle trails passing through there, through that country? A. Several of them.

Q. Several cattle trails? A. Oh, yes.

Q. What can you say as to the possibility of taking a wagon from this opening in a direction 3 miles east of there? A. You can go there with a wagon.

Q. You could? A. Yes.

Q. Describe the trails. You say there are several trails in there; describe them, as to what you saw of them, as to their size and direction.

A. Running north and northeast.

Q. Running north and northeast? A. Yes.

Q. How deep were they?

(Testimony of Mike Thornton.)

A. Well, an old trail there is wore 3 or 4 inches deep.

Q. How far easterly does that trail run from this opening?

A. It runs to Tuscarora, it follows the road, I guess.

Q. Then cattle can reach the road to Tuscarora going through that opening, can they? A. Yes.

Q. Without passing any obstructions? A. Yes.

Mr. DENMAN.—That is all.

Cross-examination.

Mr. PLATT.—(Q.) You know you can go over the top of the Sierra Nevada Mountains with a wagon, don't you? A. Yes.

Q. Is that what you mean by going over those mountains in a wagon? A. No.

Q. What do you mean?

A. These are rolling hills, not mountains. [546]

Q. You can get over them anywhere in a wagon, can you? A. Yes, through that pass.

Q. Oh, through the pass?

A. Through that pass.

Q. Where is the pass?

A. Right at the corner of those two fences.

Q. I wish you would show me the pass on the map.

Mr. DENMAN.—Which map?

Mr. PLATT.—I don't care, either map.

A. Right here (indicating).

Q. Now, just show the Court; you say right through there? A. Right through there.

Q. Do you limit it from section 6, into where?

(Testimony of Mike Thornton.)

A. Limit it anywheres through this country.

Q. How far northeast does it go?

A. Well, it goes as far as I have been.

Q. How far have you been?

A. Four miles, or 5.

Q. Can you show it on the plat. Do you mean to say there is a wagon pass running clear from these hills to the northeast?

A. No, it is not a wagon pass, but you can go there with a wagon.

Q. How wide is the pass?

A. Well, I should judge a quarter of a mile, or half a mile, that is not rough; it is smooth ground.

Q. Now, is the rest of the country around there pretty mountainous? A. No, not mountainous.

Q. Well, is it hilly? A. Yes, hilly.

Q. It is hilly, is it? A. Just rolling hills.

Q. It is more hilly, is it not, up in this northeast corner than it is down here along the white, as represented on the plat. [547]

A. Some places, but the way that pass is there, it is about the same.

Q. Now, you know as a matter of fact, don't you, this is a more mountainous country up here in the northeast than it is down here in the white?

A. Well, some places a little more.

Q. Wouldn't you call that a more mountainous country than you would down through here in the white? A. No, not on all the white.

Q. Not on all the white?

A. There are some mountains on the white there

(Testimony of Mike Thornton.)

that is higher than they are up there at the pass.

Q. Do you mean to say any mountains over on the white, or up on the northeast?

A. After you get up high enough, yes; one mountain there, Toejam Mountain, is the highest mountain there, but that is a mile and a half or two miles back of the pass.

Q. Oh, there is a Toejam Mountain there, is there?

A. Yes, call it a mountain.

Q. In the meantime there is a mountain there called Toejam Mountain? A. Yes.

Q. Is that so? There is a rocky mountain—

A. (Intg.) I call it Toejam Mountain, I never heard the name of it. I have drove cattle off the top of it and all around it.

Q. And you have always heard it as Toejam Mountain?

A. I have never heard it as Toejam Mountain, no.

Q. How do you happen to call it Toejam Mountain?

A. It stood in there by itself; it is not a mountain either, because cattle climb over, back and forth, over the top of it.

Q. I wish you would step to the plat, and read this inscription here called Toejam Mountain; was there a mountain called Toejam Mountain in that vicinity?

A. I have never heard of it, I call it that.

Q. You say you knew of Toejam Mountain, didn't you? [548]

A. I knew of it by calling it that.

Q. That is the name you have always given it, is it not?

(Testimony of Mike Thornton.)

Mr. DENMAN.—Given what?

Mr. PLATT.—That mountain up there as Toejam Mountain.

A. I don't know whether that is the mountain or not; that is a little different shape from what I have reference to.

Mr. DENMAN.—By that you refer to this Toejam Mountain drawn on the map?

A. No, that is not Toejam Mountain.

Mr. PLATT.—(Q.) How do you know that is not Toejam Mountain?

A. The way it lays.

Q. Have you ever investigated, or talked with any person who drew this map, to find out what that meant upon the map indicated as Toejam Mountain?

Mr. DENMAN.—Object to the question as incompetent, irrelevant and immaterial.

Mr. PLATT.—I am bringing this out because I made the suggestion to your Honor a while ago that every witness counsel has examined concerning this thing up in the corner, he has asked the witness whether that correctly represents anything, and I made the suggestion to your Honor that the witness did not understand, and I am trying to show that this witness does not understand.

The COURT.—Proceed.

Q. Now, as a matter of fact, you don't know from any study you have made of this plat, or from any effort you have made to find out what these inscriptions on the plat mean, you don't know from any investigation just exactly what that means, do you?

(Testimony of Mike Thornton.)

A. No.

Q. All you know is that this thing up here is characterized as Toejam Mountain; isn't that all you know about it? A. Yes.

Q. You haven't any knowledge whether that thing there is supposed [549] to run in a northwesterly or southeasterly, or northeasterly and southwesterly direction, have you? Do you know that of your own knowledge? A. No.

Q. Not of your own knowledge; but you do know that up in that section of country somewhere there is a mountain called Toejam Mountain; you know that, don't you?

A. I never heard it called Toejam Mountain; I have called it that myself.

Q. You have called it Toejam Mountain?

A. Yes, working through there.

Q. Working through there, driving cattle, you have called it Toejam Mountain, haven't you?

A. Yes.

Q. You don't know when the indictment against the Golconda Cattle Company was returned, do you?

Mr. LEWERS.—The indictment?

Mr. DENMAN.—There is no evidence here of any indictment whatsoever.

Mr. PLATT.—Is there an objection to the question?

Mr. DENMAN.—Object to the question on the ground there is nothing in evidence concerning the indictment, and that the question is incompetent, irrelevant and immaterial.

(Testimony of Mike Thornton.)

Mr. PLATT.—If the Court please, I am endeavoring to bring out the fact after the Golconda Cattle Company, the defendant in this case, was informed of the fact that an indictment had been preferred against them, and charges were being made against them, they were very liberal in the use of that unlawful inclosure. That is the only object of the question.

Mr. DENMAN.—Object to the question as incompetent, irrelevant and immaterial; it has no application to any issues set forth in the pleadings in this case, and there is no evidence to show there [550] was any indictment concerning any of the land involved in this case, and I believe the District Attorney will admit there is no indictment concerning any of the land involved in this case.

Mr. PLATT.—Not in this case, but it is an indictment against the same company concerning unlawful inclosure.

Mr. DENMAN.—And there is no testimony showing that the witness knows anything about the indictment.

The COURT.—The testimony will be admitted simply for the purpose of showing what use was made of the lands. Can't you fix the date by ascertaining what use was made in 1909, and what use was made in 1910?

Mr. PLATT.—I can fix it from the record, and what was made in 1911.

Q. How long have you been foreman?

The COURT.—He has been there three years.

(Testimony of Mike Thornton.)

Mr. PLATT.—Three years and a half?

A. In Squaw Valley.

Q. How do you keep track of the cattle and sheep that go through this road on the westerly border, how did you happen to keep track of them?

A. I am not positive how many went through there; I am only judging from the size of the bands they take in there, that they took 7 or 8 bands of sheep.

Q. Have you any method at all of keeping track of just how many cattle or sheep go through there?

A. No.

Q. Did you as foreman try to find out what cattle and sheep were grazed in there last year?

A. No, sir.

Q. Have you as foreman ever gone upon these lands represented in the blue in order to ascertain whether any of the sheep or cattle grazing upon the white or the blue, were in fact grazing upon the blue? A. No, sir.

Q. Never have done that while you were foreman?

A. No. [551]

Q. You cannot state of your own knowledge then just exactly how many cattle or sheep were grazed upon the white, can you? A. No.

Q. You are just giving an approximate estimate?

A. Yes.

Q. Do you know how many cattle or sheep grazed in there in 1910?

A. No, I do not, not positive; I know there was sheep or cattle in there.

(Testimony of Mike Thornton.)

Q. When did you say they grazed in there in 1910?

A. September, cattle, no sheep.

Q. Cattle? A. Yes.

Q. Didn't you see any sheep?

A. Not in September.

Q. Did you see them in 1910 at all? A. Sheep?

Q. Yes.

A. No, I wasn't there in the spring of 1910.

The COURT.—(Q.) Were the sheep there at any other portion of the year than the spring?

A. No, sir, just the spring.

Mr. PLATT.—(Q.) As I understand it, the cattle or sheep that did get access into this field during the year 1911 about which you have accurate knowledge, came through Opening No. 1, or where this road runs in?

Mr. DENMAN.—There is no statement as to where the cattle came in.

A. Well, the sheep were in there, and I don't know how many sheep—I am sure part of them went through that lane, because I saw their tracks, and the sheep were in there when I was in there in April and May.

Q. They were already in there?

A. They were already in there.

Q. How about the cattle, were they in there too?

A. Yes.

Q. Do you know how they got in, from where?

A. Different places outside, they drifted in there.

Q. Do you know that, I don't want any guesswork?

A. Yes, I know that. [552]

(Testimony of Mike Thornton.)

Q. Did you see them come in?

A. No, I didn't see them come in.

Q. Then how do you know?

A. How do I know what?

Q. How do you know they drifted in from different places?

A. They were in there; that is all I know.

Q. You know that you saw them in there?

A. Yes.

Q. But you can't say where they came from, can you? A. No.

Q. You would not testify whether they came through this road, would you? A. No.

Q. And you would not testify that they came through any other place, except that road, would you?

A. No, I never saw any of them going in there.

Q. Never saw any of them go in? A. No.

Q. Do you know anything about Opening No. 3 and Opening No. 4, as shown upon the plat,—do you know when they were made in the fence?

A. I have not paid much attention to those openings; I could not tell you exactly.

Q. I just want to know. You don't know when they were built, do you?

A. No, I don't know whether those are the same openings or not; I never paid much attention to openings.

Q. You haven't paid much attention to any of the openings in the fence, have you, anywhere upon the fence, as shown on the plat? A. No, sir.

(Testimony of Mike Thornton.)

Q. Didn't you testify in direct examination that a lot of cattle and sheep came through this opening in the road—didn't I understand you so to testify?

A. Sheep would.

Q. Only sheep?

A. Sheep, that is all I know of.

Q. And you say you know that because you saw the sheep tracks?

A. I saw the sheep tracks, yes. [553]

Q. But you never saw any cattle come through that way, did you?

A. No, I have never saw any cattle.

Q. All you have seen is the cattle grazing on the lands in there? A. In the field.

Redirect Examination.

Mr. DENMAN.—(Q.) Do cattle ever drift in a direction from westerly to easterly on that land?

Mr. PLATT.—I submit that is mere speculation, not based on any knowledge.

A. Yes, they drift in there, but I never saw them going there.

Mr. PLATT.—I ask that the answer be stricken out on the grounds stated in the objection.

Mr. DENMAN.—Consent.

The COURT.—The answer will be stricken out.

Mr. DENMAN.—(Q.) You said you saw cattle in there also in the month of September, 1910?

A. Yes.

Q. What brands did you see in there then?

A. Well, all the different brands belonging in that country, I can't remember all of them.

(Testimony of Mike Thornton.)

Mr. DENMAN.—That is all.

The COURT.—(Q.) Where do the sheep return from the northern country, what road do they take?

A. I could not very well tell you that either; some of the sheep come through that country through there. Tom Nelson's sheep come through there last fall; most of the sheep come down Rock Creek north, and Fraser Creek, west.

Mr. DENMAN.—(Q.) Where is Fraser Creek?

A. West.

Q. To the west of that? A. Yes.

Q. I want to ask one other question on direct examination that I forgot. Where is Gold Circle from here? A. West. [554]

Q. How far is it from here,—how far is it from the boundary line of this fence on the west side of Rock Creek? A. About 6 miles.

Q. Are you sure of that?

A. Well, it is a little further; I think it is 5 miles and $\frac{7}{8}$ from Dutton, and I think it is a little further from there.

Mr. DENMAN.—That is all.

(Court adjourns until Tuesday, March 12th, 1912, at 10 A. M.) [555]

Tuesday, March 12th, 1912, 10 A. M.

Mr. PLATT.—If the Court please, on yesterday Mr. Denman asked me to give him for his inspection a map which Mr. Flocker originally returned to me. I think this is the map, and if he desires, I have no objection to his looking at it.

Mr. DENMAN.—The map you showed me was on

(Testimony of Mike Thornton.)

different colored paper, as I recollect it.

Mr. PLATT.—No, this is the only plat I have as showing the return on this property. I freely exhibited this map, and also a plat I had on the Rock Creek inclosure, but I don't suppose you want the Rock Creek inclosure now. If you want to see that I am quite willing you should.

Mr. DENMAN.—Oh, no, I can see that in due time, if necessary.

Mr. PLATT.—This is a lead pencil sketch, and we did not introduce it in evidence, because the other is an ink sketch, finished up.

Mr. DENMAN.—Call Mike Thornton, please.
[556]

MIKE THORNTON, recalled.

Mr. DENMAN.—(Q.) Mr. Thornton, I want to ask whether upon that visit in the months of April and May, 1911, when you were looking for beef cattle, you visited what is known as Noble's fence?

A. Yes, sir.

Q. What was the condition you found that fence in at that time? A. The condition was bad.

Q. Would it hold cattle? A. No.

Q. What did you see?

A. Well, the fence was down, posts down.

Q. What was the condition of the posts that you saw? A. Rotten.

Q. About the wire? A. The wire was broke.

Q. Now, just come to this map, if you will, please. Here is Opening No. 6 on the map; just to the east of the reservoir or lake, you notice that the lines there

(Testimony of Mike Thornton.)

terminate with a sort of a "T" crossing, first, they go up, and then sort of a "T" crossing; is there anything like that there? A. No.

Mr. PLATT.—I think there are two lines made there in order to emphasize the aperture, if the Court please; I don't think the fence actually runs that way.

Mr. DENMAN.—There is nothing in the notation to show that.

Mr. PLATT.—As I understand it, you mean the two parallel lines at the end of the aperture?

Mr. DENMAN.—About a thousand feet long.

The COURT.—It is simply an opening, that is all?

Mr. PLATT.—That is all, if the Court please.

The COURT.—There is no double fencing?

Mr. PLATT.—I don't think so. Is that so, Mr. Flocker? [557]

Mr. FLOCKER.—No, sir.

Cross-examination.

Mr. PLATT.—(Q.) When did you see that North's or Noble's fence?

A. April and May, 1911.

Q. What were you doing in that country then?

A. Getting beef cattle.

Q. Where were you getting it from?

A. Up on Toejam.

Q. Toejam what?

A. Toejam Creek, and that country up there.

Q. Did you make any particular examination of North's fence then? A. No, just noticed it.

Q. Just noticed it?

(Testimony of Mike Thornton.)

A. Yes, as I rode by. I have noticed it for years; it has been down for several years.

Q. Where has it been down?

A. Different places.

Q. Well, could you swear positively it has been down along the places shown upon the plat?

A. Yes, if I knew the places.

Q. That is, if you could identify the places with the plat, you could testify probably whether they had been down upon the places indicated upon the plat?

A. Yes.

Q. But not being able to identify the places with the places indicated upon the plat, or with the fence indicated upon the plat you are not able to state, are you?

Mr. DENMAN.—He has not stated he was not able to identify the places on the plat.

Mr. PLATT.—I thought he just said so.

Mr. DENMAN.—No.

WITNESS.—No, I could identify the places on the plat.

Mr. PLATT.—(Q.) You think you could identify them? A. Yes.

Q. Well, show the Court where they are.

A. That is, as I understand this plat, where the fence turns north. [558]

Q. Where the fence turns north, where is that?

A. At the southeast corner of the plat.

Q. You mean of North's fence? A. Yes.

Q. That is the extreme easterly corner?

Mr. DENMAN.—That is the southeasterly corner also?

(Testimony of Mike Thornton.)

A. Yes. The fence was down along in here, and down here for a quarter or half a mile.

Mr. PLATT.—(Q.) Down where?

A. Running north.

Q. Running north? A. Yes.

Q. North from this little arrow point near Opening No. 5?

A. Yes, it was either a quarter or half a mile down there.

Q. How much was down along this easterly section, or was when you saw it in April?

A. Probably 300 yards.

Q. Any more than that?

A. Another place there was a gap had been cut there for several years, I guess.

Q. We don't want any guessing.

A. I know it was cut when I was there.

Q. In April? A. Yes.

Q. What do you mean,—the wire was cut?

A. Yes, the wire was cut.

Q. How big a place was cut then?

A. Well, between two posts.

Q. Just between two posts? A. Yes.

Q. How many feet of wire was down in April along the section from where the fence begins to go north to this extreme eastern point, when you saw it?

A. Well, it was either a quarter or half a mile; I don't know the exact distance.

Q. There is quite a difference between a quarter and half a mile, isn't there?

A. I didn't pay much attention to it.

(Testimony of Mike Thornton.)

Q. You didn't pay much attention to it? [559]

A. I know it was down for quite a distance.

Q. Was it down for a long distance, and up again, and down for another long distance, or was it all down in one place?

A. Well, it would be up in places and down in places.

Q. Well, how big were these apertures where it was down?

A. Well, I could not tell you exactly the distance.

Q. Well, now, according to your recollection when you were there in April, you remember, don't you, that the fence was down in places? A. Yes.

Q. But you are not able to testify the width of the gaps or the width of the openings, are you?

A. No.

Q. Just have a general impression that the fence was down in places, is not that so?

A. Yes, I knew the fence was down.

Q. You would not want to testify in how many places it was down or what the dimensions of the aperture was, would you?

A. No, not the exact numbers.

Q. And you say that is based on what you saw in April or May? A. Yes.

Q. You don't know in how many places the fence was cut, do you?

A. No, just that one place, is all I remember.

Q. That was between two posts? A. Yes.

Q. As a matter of fact, you haven't a very distinct recollection have you, as to just what the condition

(Testimony of Mike Thornton.)

of that fence was?

A. Yes, I seen the fence all round, it is in bad shape.

Q. I mean as to the gaps, openings, and where it was cut?

A. No, except just what I have told you.

Q. Just a recollection from what you saw, namely, that the fence was down in places? A. Yes.

Q. But you would not want to testify as to the distance it was down? A. No. [560]

Q. Now, you don't know how the fence came down, do you, in places? A. No, sir.

Q. You don't know when it came down, do you?

A. No.

Mr. PLATT.—That is all.

Mr. DENMAN.—That is all. I would like to further cross-examine Mr. Flocker on his map, if the Court please. I don't think we will have any disagreement on it, but I would like to have him explain his notation.

[**Testimony of Ira M. Flocker.**]

IRA M. FLOCKER.

Mr. DENMAN.—(Q.) Mr. Flocker, your map here on the west side of Opening No. 6 shows the fence as turning up, does it not? A. Yes.

Q. That is to say, there is a corner as if the fence had been completed to that corner, and turned up?

A. Turned and ran as far as the stream in a north-erly direction.

Q. In other words, it does not indicate they were coming across to meet this fence on the other side?

(Testimony of Ira M. Flocker.)

A. No, sir.

Q. And those two "T" crosses are simply terminal lines? A. They indicate the opening.

Q. You didn't show that indication on any other place here, did you?

A. Some places I left it off, but this place, I didn't.

Mr. DENMAN.—That is all, your Honor, that is our case.

Mr. PLATT.—I don't think we have any rebuttal, if the Court please.

Testimony closed. [561]

I, A. F. Torreyson, Official Reporter of the United States District Court, in and for the District of Nevada, DO HEREBY CERTIFY,

That as such Official Reporter, I took verbatim shorthand notes of the testimony given and proceedings had in said court upon the trial of the case of The United States of America, Plaintiff, vs. Golconda Cattle Company, Defendant, No. 1166, and that the foregoing transcript, consisting of pages 2 to 561, both inclusive, contains a full, true and correct transcription of my shorthand notes of the testimony given and proceedings had on the trial of said case.

A. F. TORREYSON,
Official Reporter.

Subscribed and sworn to before me this 12th day of April, A. D. 1912.

[Seal]

T. J. EDWARDS,
Clerk of the U. S. District Court.

[Indorsed]: * * * Filed May 25, 1912. T. J. Edwards, Clerk.

[Certificate of Clerk U. S. District Court to Transcript of Testimony.]

District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing 561 typewritten pages, in two volumes, is a true and correct copy of the testimony on file in my office, in the cause entitled *The United States of America, vs. Golconda Cattle Company*, the same being docket No. 1166.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Carson City, Nevada, this 25th day of May, 1912.

[Seal]

T. J. EDWARDS,
Clerk.

[Endorsed]: No. 2143. United States Circuit Court of Appeals for the Ninth Circuit. *Golconda Cattle Company*, a Corporation, Appellant, vs. *The United States of America*, Appellee. Transcript of Testimony. (For Transcript of Record, see Other Volume.) Upon Appeal from the United States District Court for the District of Nevada.

Filed May 28, 1912.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2143

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GOLCONDA CATTLE COMPANY

(a corporation),

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT ON REHEARING.

In our petition for rehearing we have set forth the misapprehensions of fact as to the location of the spaces between the fences in question here, and as to the purpose of the company in erecting them. Upon re-examination of the government's exhibit, we have discovered what we believe to be the cause of the court's error. The legend adopted by the draughtsman for a fence is a straight line, with nothing to distinguish it from the section lines. As a section line crosses many of the fourteen openings between the various fences of the company and of the other owners, the court probably failed to recognize all of them as openings. In any event, the effect of the mistakes of the opinion is to

leave a very unjust and unfair impression of *mala fides* on the part of the Golconda Cattle Company and those connected with its management, which we feel confident we may rely on the court's sense of fair play to correct.

As the court has seen fit to go behind the findings of the lower court, we have considered the facts in much fuller detail in this brief than in any of the others, and this may be regarded as a substitute for all of them, both as to the facts and the law.

The Golconda Cattle Company is a corporation engaged in farming and cattle raising in Squaw Valley, Nevada, and, incidentally, in converting its holdings of semi-arid sage brush lands into alfalfa and grain fields through the establishment of a large irrigation system. The lands in question in this suit are situated in the Squaw Valley region, in a mountainous country about fifty miles north of the Humboldt River, and in its watershed. They are at an elevation of from six to eight thousand feet.

Squaw Valley lies to the southwesterly of the confluence of two creeks, Rock Creek and Willow Creek, which flow to it from the higher mountain country to the northeasterly.

It must always be borne in mind that the government's map shows only about a fourth of the 40,000 acres of the company's holdings, the great body of its lands lying in Squaw Valley contiguous to the lands in blue at the westerly end of the map (Osborne, pp. 74, 228). The government map is cunningly contrived to show a thin blue chain of lands encircling a body

of government land. The fact is that the larger fields of the company, already reclaimed and in alfalfa, lie to the southwest, while the portion shown on the government map are but continuations of this main body, where the company, following the universal custom in semi-arid countries, has taken up the rich creek bottoms as far as they are cultivatable. The creek bottoms are but the fringes of a great alfalfa and grain ranch.

Rock Creek extends in a general northeasterly direction from the main body of the company's lands for about seven miles and then forks, its easterly branch, Tojam Creek, extending almost due easterly for seven miles further. Willow Creek extends almost easterly for eleven miles and then northerly to its northerly branch, Siawappe Creek, which flows northerly and rises within about two miles of Tojam Creek. The two creeks and their upper branches thus almost encircle a very considerable area of land.

As to the government land thus surrounded by the creeks the lower court finds, upon undisputable evidence, that:

"The government land is all rough and hilly; it has a general slope toward the southwest, as well as an inclination from the central high land toward Willow Creek on the south, and to Rock Creek and Tojam Creek on the north and west. It affords only a somewhat scant pasturage for about two months in the early spring."

Trans., p. 27.

"Inside the inclosure there are some 26,000 acres of government land and 11,000 acres of privately owned lands, nearly all of which belong to defendant. The 11,000 acres

are for the most part bottom lands, and almost completely surround the tract owned by the government.”

Trans., pp. 24, 25.

“Defendant’s bottom lands are undoubtedly more valuable than the government land which they inclose.”

Trans., p. 30.

The company has a large dam and reservoir on Willow Creek, which stows water for use on the lands on lower Willow Creek and in Squaw Valley below the confluence of Willow Creek and Rock Creek, for a radius of twenty miles, serving a territory to the westward, principally off this map, including the Lake and Mansion fields (Osborn, p. 188). The Frazer Creek Ranch adjoins to the west of Rock Creek (190).

It has also a dam site on Rock Creek, where the waters of that creek may be stowed. The acquisition of the creek bottoms is thus intimately connected with the irrigation system of the company.

There is no disagreement among any of the many witnesses in the case as to any of the facts concerning the arable quality of the creek bottoms, the rough and hilly character of the government land lying between the creeks, the scanty vegetation it produces and its general valuelessness for anything but its limited pasturage. The testimony is uncontradicted that this land could not be irrigated. There is not a line of testimony to support the theory that any of it was fit for farming. The finding of the lower court clearly establishes the contrary.

As is shown by the flow of the streams, the country rises to the northeast. As one comes into this higher territory good grazing land is found, the objective of cattle owners of that district for their summer feeding. The head waters of the two creeks mark the beginning of this higher grazing land and it extends from these head waters for some distance. All of the witnesses are agreed upon this and the deeply worn cattle trails towards and over this higher country are mute evidence of the customs of the cattle themselves.

It was the natural desire of the persons owning the creek bottom, up to the time they should be placed under cultivation, to steer their ranging cattle along and up the bottoms, where they would get the best grazing until that was exhausted, and then direct them into the higher territory beyond.

The operations of the Golconda Cattle Company, in fencing, clearing, planting and irrigating this great territory, had extended over a period of more than four years prior to the filing of this complaint on May 31, 1911. The alfalfa and grain fields to the west of the area shown on the map had been developed first, and the surveys and fencing of the lands at the joining of the creeks and then up the creek bottoms, had followed. The plan of the company was to fence and cultivate its fields one after another up the creek bottoms as the last part of its general scheme. Contrary to the impression received by the writer of the opinion heretofore filed in this case, a very large portion of the lands even on the creek bottoms shown on the map had been fenced, both on

the inside and the outside, and made into fields, prior to this suit and were then planted in alfalfa and grain. As to the remainder, the surveying had been completed for the fence on both the inside and outside of the company's lands, and the posts and wire bought over a year prior to the filing of the complaint (pp. 164, 167), and the remaining fences on the inside of the lands—that is toward the government lands—were under construction on a portion of the Willow Creek property at the time of the filing of the suit.

There is not a line of testimony in the entire record questioning the *bona fides* of the intent of the company to reclaim all its territory in the creek bottoms and plant the same to grain, alfalfa and vegetables. Its continuous similar development of its property to the westerly and southwesterly would have been a sufficient answer had the question of *bona fides* as to the creek bottoms been raised.

All this is borne out by the testimony of the witness Osborne who was called by the government and accepted by us. The court commented on the good faith of Osborne's testimony at page 195.

“Q. Mr. Osborne, you testified regarding this fence here, running from T. 39 north, range 47 east, down to Opening No. 1. Is that fence an isolated fence, or is it a part of an enclosure to the westerly, which inclosure is inclosed *on the east side* by that fence?

A. That fence is the east, and part of the north of a field of 1600 acres, company land.

Q. When was that inclosure built?

A. That was built in the spring of 1909.

The COURT. Q. Is that the inclosure south of the Midas road?

A. Oh, no, that is the Fraser Creek country; that is up in what is called the Fraser Creek country.

Mr. DENMAN. It is right north of the Midas road here. Sketch in, if you will, this field of which that fence I have just described is the easterly boundary."

Record, page 164.

"A. Well, I don't know as I could just exactly.

Q. In a rough way.

A. I could give the locality of it.

Q. In a rough way. (Witness draws on plat.)

Q. How far below 'Opening No. 1-150' is it?

A. Oh, that is the lane, it comes to the lane."

"Q. It comes to the lane, and forms the northern boundary of the lane in there?

A. Yes.

Q. Now, I understand that you have fenced that inclosure somewhere around 33, on the north boundary.

A. Yes, a small field.

Q. And you say you planted in there?

A. Barley and potatoes.

Q. What preparations had you made to fence the land running from T. 39 north, range 47 east, around to North's fence on the northerly side of—or around Rock Creek and Toejam Creek?

* * * * *

A. We have the posts and wire at the Dutton ranch to make a field of that now.

Mr. DENMAN. Q. How long ago did you get that wire?

A. Bought that wire about two years ago."

Page 165.

"Mr. DENMAN. Q. The same thing is true of all the balance of the company's land on those creeks?

A. My orders was to fence the fields, from 40 to 5,000 acres of the company's land, to entirely close it.

Q. These fencing operations, enclosing field after field, have gone on for the last five years, have they not?

A. Four years, while I was with the company."

Page 166.

“Q. What did you make it for?”

A. I made the survey in connection with the lands of the company. That is Fraser Creek (indicating); these lands, and these lands up here, lands in what is called the Noble Field, summer range, to find out where such and such lands was. That is what this 22 miles was made for, to find these section corners; them is all quarter corners and section corners set; they have surveyed this line, and set corners, whenever we touched a section corner or quarter corner, we set a rock or post, also on the inside; when we crossed here on a section corner or quarter corner, we set a post. That surveying was all done in connection with this fencing.

Q. Let me ask you: will you testify upon oath that it was the intention of the Golconda Cattle Company to build fences upon the inside of the blue lines, and along the outer rim of those blue lines; will you testify upon oath it was their intention so to do, and that they did actually institute and authorize surveys for that purpose?

A. To run this just as the company's lands run, it was the calculation of the Golconda Cattle Company when they made them surveys to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; *to fence both sides of their land*; I had orders from the Golconda Cattle Company to that effect.”

Pages 190-191.

“The COURT. You had better lead the witness just for that purpose, and find out what he did.

Mr. DENMAN. Q. You had a surveyor in your employ, and had the corner posts set up for the fence along the *north line* of the properties of the company along Willow Creek?

A. I did.

Q. And then you had it surveyed again?

A. Had it resurveyed, that is, retraced.

Q. Retraced. And you think they had put in a portion of the fence around the dam here?

A. Yes, there was other construction when I left, and I have not asked anybody, I don't know whether it is finished, I have not asked anybody.

Q. The same thing is true about Siawappe?

A. Yes, same thing about Siawappe.

The COURT. Q. Mr. Osborne, have you cut any hay in that country there inside those fences?

A. I have inside of their line; yes, sir. They harvested a grain crop of something like 470 acres this year inside of that fence, and it is all seeded to alfalfa, that is on company's land below that red line.

Q. Just point out the place.

A. This country right here (indicating).

Q. What did you have there?

A. There was grain. There was grain and potatoes put in below the dam here, of about, when I left there, probably 15 acres of grain or 10 acres, maybe, I don't know just how much there was.

Mr. LEWERS. 10 acres of what?

A. Grain and potatoes. There also was probably 40 acres of grain and potatoes, mostly grain, put in on Toejam, 30 acres maybe, probably, I don't know.

Q. How many acres would you say?

A. Safely say 30 acres; I never measured it; 22 sacks of potatoes was planted there, I know."

"Mr. DENMAN. Q. That is, you were trying out that country?

A. Well, there was no trying out; we knew we could raise them if they were attended to.

The COURT. Q. Is that the first year you attempted to raise crops on that ground?

A. It was in 1911, yes, that is the *first time we had them protected*, put these other fences up, that is last year was the first year.

Q. Well, have you ever cut any hay down in the southwest corner of the tract, prior to this year; that is, south of the fence?

A. No, sir, not in that direct locality. Now, that was cleaned off, in the brush; the brush cleaned off, I told you, in 1910, and the crop was put in in the spring of 1911, that is a continuous work up Willow Creek, and the other ranch, all west of that for two miles or two miles and half, is alfalfa, and all the other ranch part.

Q. Where do you use the water that is impounded in the reservoir?

A. We use that on the land I am speaking about, take it over that point, over Rock Creek, and to the Mansion field; it is used on this land here just the same, used on the reservoir, then used out again on that field; then take it in the big ditch around a point, take it into another field out in the Mansion field and down into the Lake field, a radius, all told, of probably 20 miles, a ditch."

Record, pages 186, 187, 188.

"Q. Was that the extent of your instructions?

A. Well, my instructions was to put that fence there; all of the Golconda Cattle Company's lands that joined up together, that was practical for grazing or farming, was to fence them *in* and *outside*, then my instruction went on to say, anything that was practical to farm, clean the brush out, clean off the brush and put it in alfalfa, or anything.

Q. When did you commence to build the fences *on the inside*?

A. I commenced in 1909.

Q. When did you quit?

A. I quit the first day of July, 1911.

Q. You quit building fences then?

A. Yes, sir."

Record, page 193.

It should be noted, though it is of minor importance, that the ownership of the Golconda Cattle Company does not extend over all of the land shown in blue on the government's map. All that large area thus colored on the northeasterly corner of the map and lying to the north of opening No. A, and to the east of the word "North's" in Section 36, belonged to other owners, and none of the fences on them were erected by the defendant.

The company was also engaged in the stock business, and it naturally desired, during the period of the development of its properties, and prior to completely fence-

ing them, to get the utmost good it could out of its rich creek bottoms. It hence placed its fences along the outside of these lands first before filling in the entire interior boundary line and completing the enclosures of the balance of the bottoms.

These enclosures along the outside of its property performed the double purpose of confining the cattle to the grassy bottoms and steering them, as they drifted from lower to higher territory in the spring time, according to the universal custom of cattle in arid countries, up toward the rich high mountainous feeding grounds beyond the head waters of the two creeks.

The uncontradicted testimony is:

“Mr. DENMAN. Q. What is this country beyond—is it a high mountainous grazing country?

A. Fine grazing country.

Q. Now, tell me, what is the—of course I know this is not necessary for this court, but it may be on beyond—what is your natural summer range,—is it in the higher rather than the lower regions?

A. Summer time it is high altitude.

Q. What is the reason for that?

A. Well, better grass, and colder; better grass, the higher up you get the better grass country you get.

Q. How about the condition of the feed?

A. That is an open range.

Q. That is an open range in here, it is?

A. Yes.

Q. How about the condition of the feed between the point marked ‘Opening No. A’, and North’s fence, running to the northeasterly from there for about five miles?

A. It is just an ordinary slope from these low hills, an ordinary mountain slope, up some steep ravines, and nothing impassable for a buggy or wagon or sheep, or cattle, or anything else to pass over it.

Q. What is the condition of the feed in that country?

A. Bunch grass and sunflowers in summer time close to the mountain, up around the rocks, rocky spaces; have a kind of a sunflower, what we call a sunflower, weeds and such things, fine feed.

Q. Cattle range right up to the summit, and through those rocks?

A. Certainly."

Record, pages 170, 171.

"Q. Do you know, Mr. Osborne, what the purpose of building that entire fence as shown upon the map, was; what was the purpose?

A. Well, there was two or three purposes.

Q. What were they?

A. *One was to steer the cattle up to the mountain, and the other purpose was the company's intention of fencing their own lands."*

Record, pages 213, 214.

"Mr. PLATT. Q. Was one of the purposes of this fencing to keep the cattle of the Golconda Cattle Company that might get into this inclosure here of the Government land, from getting out?

A. No.

Q. That wasn't the purpose at all?

A. They would get out.

Q. But the fence wasn't built to keep anything in, was it?

A. No, sir, it was not.

Q. That wasn't the purpose of the fence?

A. No.

Q. Was it built to keep anything out?

A. No, sir, it wasn't built to keep anything out; that is to keep it out, because that—

Q. (Intg.) Then, as I understand you to say, the fence was not built to keep anything in, and it was not built to keep anything out; is that right?

A. As I said before, the fence was built with the object of helping steer stuff up, and at the same time with the object of building the fence, was for the company to fence their lands.

Q. To steer stuff up where?

A. Into the high mountains. I tell you, if you were a cow man, a cow man could explain it.

The COURT. Haven't we been over that already?

WITNESS. We have been over it time and again."

Record, pages 214, 215.

The great highway of the country is the Midas-Tuscarora road. It is the only road shown on the government map though two others were proved at the hearing, one passing through the lands in question, starting at opening No. 7, crossing the government land, and coming out from opening No. A, and going thence to the town of Tuscarora, and the other running from opening No. 7 to the Tie Corral country. The Midas-Tuscarora road enters the lands of the company at their western end, and is first shown on the map of the government at the point marked opening No. 1, of about 150 feet width. It there passes through a lane and on through the government lands for a distance of nearly two miles. It then re-enters the company's lands and passes up the Willow Creek bottom, continuing until about half a mile below the government reservoir, inside the company's fences. At this point it passes through the fence through an opening 100 feet wide, and continues along Willow Creek bottom, still on the company's land but outside its fence, until it reaches the southeasterly end of the territory, it passes on to the easterly.

Along the line of this county road at its easterly end, there is an opening 3400 feet long in the company's fences at a point where they cross a valley which is the natural gathering place of cattle coming up from the

Humboldt country to the south. The ranges from the south lead into this valley and the cattle, working northerly (in the spring), from the Humboldt bottoms, where they winter, would be naturally drawn there as a feeding ground and for the purpose of watering in Willow Creek. The witnesses are agreed that the natural direction for the cattle to range is northerly in the spring, returning in the fall. The opening at this point leads directly into the government land. It is within sight of the main high road and, in every way that an opening can be, is a direct invitation to both settler and cattle to enter upon the government lands in question. This opening is marked on the government's map at one place as half a mile wide, and at another as a quarter of a mile wide. The actual distance was measured by Surveyor Tilden, and the District Court found it to be 3400 feet on his testimony. Speaking of this opening, the court says:

“Gap No. 6 is about 3400 feet long, and is favorably and conveniently located for the passage of cattle drifting toward Rock Creek Mountains.”

Record, page 26 (small volume).

This finding is based on the testimony of the witness, McClellan, offered by the government and accepted by the defendant.

“Mr. DENMAN. Q. Can you tell me through what portion of the country south of this general map here, the cattle coming from the south in the springtime would naturally pass in, working up to the higher country beyond; where would they come up?

“A. They would come up and strike Willow Creek, between Hot Creek and the point where the creek turns to the north,

principally at the point where it turns to the north, and where the road shows, I suppose that is the road—no, it is not—but there is a road that runs in and drops onto the creek, just below the northeast of the quarter section corner, they would come right in that strip of country there for about three miles.

Q. What can you say as to the topography of the country right about this space near Opening No. 6, and to the south generally, with reference to its being a valley or precipitous, or what it is?

A. Well, that is valley land there. Opening 6, that is right on the valley, it is right in the valley.

Q. And is that a place where cattle would naturally congregate?

A. That is a watering place.

* * * * *

A. They would work, some of them up the creek, some would cross the creek and work up on north, to the west of the creek.

Q. What is the natural trend of the cattle in the spring-time with reference to direction of travel?

* * * * *

Mr. DENMAN. Q. The cattle that are in Humboldt, Humboldt Valley?

A. The trend is to the north."

Record, pages 254, 255.

"Q. Now, I want to ask you about the character of the country where you made this opening of half a mile here.

A. That is on the Willow Creek.

Q. Is there any Creek leading into that at the point of the opening?

A. Well, there is a ravine, and cow trails.

Q. Can you tell me with reference to the passage of cattle coming from the south to the north, whether or not that is a natural place for the cattle to gather, and pass through to the north?

A. It would be; they gather in that locality.

Q. Is it not true there is a little valley running out through 32, and back around past 31, surrounding that opening at that point?

- A. It is.
- Q. And that valley is a natural gathering place for cattle?
- A. The cattle drift into it from the south and the east.
- Q. There is a road coming there, isn't there?
- A. A road right by.
- Q. What road is that?
- A. Tuscarora road passes right by there.
- Q. Isn't there another road there also?
- A. Another road comes over the Tie Corral country.
- Q. How is 'Tie' spelled?
- A. Railroad ties, that is all the name I know it by.
- Q. So that cattle coming down Hot Creek, and straying to the easterly, would catch in that valley?
- A. Right in that spot.
- Q. And go through that opening?
- A. They could, or go around the blue country, either one."

Osborne, pages 175-176.

In considering the question of the accessibility of the government land to settlers, we regard these openings on the main highway of the country as paramount evidence, both on the question of actual physical accessibility and of the intent of the company not to exclude settlers and cattle therefrom.

Following the road as it enters the extreme westerly end of the land, it passes through an unobstructed lane 150 feet wide, directly on to the government lands. It then parallels the government land for five miles, over half of this distance with nothing between it and the government land lying less than a quarter of a mile to the northerly. It then passes out of the company's fences, through an unobstructed opening 100 feet wide, and along the outside of the company's fences, on past the 3400-foot opening at the easterly end. It is inconceivable that any settler could remotely dream, as he passed

along this road, two miles of it over the government land then some three miles with no obstruction between him and the government land and finding the opening of 3400 feet along the road as the most easterly point of access to the land, at a natural gathering place for cattle, that the Golconda Cattle Company intended the exclusive appropriation of the government land, or to prevent settlers entering there, or that he, the settler, could feel in the slightest way hindered or restrained from reaching the land in the interior.

As to the other road from below the reservoir to opening No. A, and thence to Tuscarora, this leaves the government land through an unobstructed opening 300 feet wide, after traversing a distance of six miles across the government land itself (Dorsey, p. 324). A third road coming over from the Tie Corral Country also passes the 3400 foot opening (Osborne, p. 176).

Besides the three openings where the roads enter and leave the government lands, and the large opening in the valley at the southeasterly corner of the territory and alongside the county road, the company left many other openings. All of these are at places of easy access and are themselves unobstructed. Commencing at the westerly side of the tract, at opening No. 1, the lower court correctly finds the next opening of 100 feet width, known as No. 3, to the northerly and at a distance of slightly over four miles. About the same distance further along the fence is another opening of 100 feet width, known as opening No. 4. From this to opening B, which is marked 500 feet on the government map

there are two and a half miles of fence. The company's fence ends $2\frac{5}{8}$ miles further to the east, at North's fence, at which point there is an opening 120 feet wide (Ex. A). North's fence continues for a distance of a mile and a half, in which there are five openings ranging from 90 feet to 312 feet in width. These openings are where the fence is down, wires broken and much of them coiled up (Lamb, p. 354).

From the end of North's fence to Nelson's fence is an opening of a mile and a quarter in an air line. The opening here is absolutely unobstructed. The government map makes it appear completely closed by a long snake-like looking object marked Toejam Mountain, which the government's legend calls Natural Barrier. Inspector Flocker, who drew the map, admitted on cross-examination that he had never been within a mile of this alleged barrier (p. 425), and that it would not stop cattle (p. 434). It was shown by every one of seven witnesses that it did not exist in the form and place described on the map and that there was no natural barrier even partially closing the mile and a quarter gap.

The government's witness, the surveyor, McClellan, tells us that instead of running in the general north-westerly and southeasterly directions, as it is drawn, to close the gap, it runs easterly and westerly and bears south of west.

McClellan says, at pages 256, 257 and 258:

“Mr. PLATT. Q. Have you ever been up in the country indicated on the plat as Toejam Mountain?

A. Yes.

Q. What is the condition of the country?

A. That is the country I was speaking of. That that is marked as 'Toejam Mountain' is a ridge lying between Toejam Creek and Siawappe Creek, that extends easterly and westerly, bearing a little bit south of west.

Q. How high is the ridge?

A. Oh, I should judge from the Siawappe Creek up to the summit, it must be a good thousand feet high. It is a mile and a half, I think, from the creek to the top of the ridge.

Q. It would not be a natural place for cattle to graze over, would it?

A. It is all fine grazing land there; they do graze over it.

Q. Is it a natural course for them to take, and graze over it?

A. Yes, that is the course they take when they get up in there and graze around, or would if allowed to do as they please, graze around Siawappe Creek, cross along the north side of that creek and drop over onto Rock Creek, and Toejam Creek, as it is called.

Q. You say they would graze there if they ever got up there?

A. They get there; I have seen them there.

Q. Is it a natural place for cattle, a natural trail for them?

A. Not exactly a natural trail; they are on the summer range when they get up in there.

* * * * *

Q. It would not be a natural course for them to take, would it?

A. Yes, the cattle that are to the northeast, over in Independence Valley, don't cross that high mountain unless they are driven across, or forced across through lack of food.

Q. They would have to be driven or forced in some way?

A. They come over the mountain that lies about *4 miles east of this country.*"

McClellan, pages 256, 257, 258.

Its true position is shown on defendant's map in evidence which is based on an actual survey of the land.

It fills less than a fifth of the space of the gap and is nearly a mile from it.

Defendant's Ex. "A"; Tilden, pages 446 to 466,
et seq.

A wagon could be driven over it (Thornton, p. 660). A survey showed that a railroad could be built on natural grade over the very place where the snake-like object appears (Tilden, pp. 549 to 569). Two disinterested witnesses, Mr. Lamb, the sheriff of the county, and Mr. Sheehan, the manager of the bank at Winnemucca, crossed the mile and a quarter gap at the northeast corner shortly before the trial. They identified all the places in the fences on the government map. Both testified that the 1¼ mile opening had easy grazing ground on both sides, with abundant summer feed. Neither *could find the barrier across opening 5 described in the government map as Toejam Mountain.*

Sheehan, page 491;

Lamb, page 335.

Osborne describes the territory as follows:

"Q. Let me ask you about Toejam Mountain; is that properly drawn on there?

A. Well, it don't represent Toejam Mountain at all, the way Toejam Mountain runs, at all.

Q. Does it represent anything in there that looks like it?

A. It doesn't look like Toejam Mountain.

Q. As a matter of fact, Toejam Mountain runs the other way, does it not?

A. The long ridge of Toejam Mountain runs the other way.

Q. Is it not a fact there is a space for a mile or a mile and a half in there, over any portion of which you can drive cattle?

A. Ain't any portion but what you can drive over the summit of Toejam Mountain with horses and cattle.

Q. Is it not a fact, many places you could drive a wagon into this country, going on beyond?

A. A few places.

Q. How about feed in there; is it not a fact that cattle would naturally graze right through this opening out into the country beyond?

A. Yes."

Osborne, p. 170.

It is most significant in view of the testimony of all these witnesses of reputation and standing and the production of an actual survey of the land, that Melrose, the other government inspector, was not asked any questions to support the theory of the government, as shown by its map, concerning this alleged natural barrier. The government offered no evidence to contradict the defendant's unanimous testimony that this higher country at the northeast corner of the territory in question was the natural summer feeding ground where the stockmen desired their cattle to go as the lower country feed was exhausted.

How unfair to the defendant is the attempt of the opinion to show that the higher country to the northeast merely completed, with the fences, a barrier to the government land, whereas in fact the fences acted as an aid to get the cattle *up to* this higher land which was the objective in summer of all the cattle of that vicinity. The fences were for the purpose of getting the cattle *through* gap No. 5, not to stop them at that point.

Continuing on down to the southerly, we come to opening No. A, 300 feet wide, and having a creek on one

side and a spring on the other (Petrie, p. 624), a natural gathering place for cattle to enter or leave the government territory, with water on both sides of the opening.

Further to the south is the 3400-foot opening alongside the Midas-Tuscarora road which we have described above.

Continuing to the westerly a distance of about four miles, we come to opening No. 7, 100 feet wide, through which the two roads enter.

The next opening, $5\frac{3}{8}$ miles to the west, is 100 feet in width and the next, about three miles to the westerly, opening No. 1, at which we began.

Each one of these openings, the uncondradicted testimony shows, was at a place of free access, and was unobstructed. The greatest distance cattle would have to travel in any event would be about $2\frac{1}{2}$ miles to reach an opening, that is to say, it would not be greater in any event than half the distance between any two openings. As the fences the cattle would first encounter were along the outer side of a rich bottom country, cattle from the outside would naturally follow the fence, over well defined cattle trails, until an opening was found through which they could reach the bottom. Once through, the majority of them would follow the natural tendency of cattle to stray along the bottoms and thence up toward the higher feeding grounds.

It is true that these openings would permit the company's cattle to wander off the bottom lands into the

hills on each side but, as the tendency of the cattle is to follow up the bottoms and as the openings are at considerable distances apart, the fences would minimize the straying of the cattle. Of course where we had enclosed our lands with entirety in the bottoms the cattle of strangers could not feed upon them. This is hardly a matter about which the government, which has sold us the lands, can make a complaint.

So much for the topography of the country, the fences and the roads. A territory which can be reached through one space a mile and a quarter wide, one space 3400 feet wide, and twelve others from 100 to 300 feet wide, all unobstructed and all accessible, and having two open roads crossing it, and a third leading to one of its largest openings, is not *prima facie* enclosed so as either to shut out or shut in cattle or settlers, or intimidate anyone.

As we might have expected, there is not a line of testimony or an intimation that any settler was obstructed, impeded or restrained by any of these fences. Settlers passing through this mountainous region would naturally follow the general highways which, as we have shown, would have taken them directly on to the Government land. It is not conceivable that they would have gone into the country without consulting at one or another of the neighboring towns and learning that the road led directly through this territory, if that had been their objective. If they had gone across country from any other direction, they would have come to the company's lands and found its fences, and learned that

they would have a neighbor. Certainly they would expect to fence their own lands and could not complain of this. Had they followed down their future neighbor's land, they would have found, within a distance of not more than two and a half miles in one direction or the other, an opening leading to the Government land beyond. Two and a half miles do not seem a distance to distress any settler after coming all that way to find this promised land which the court describes (p. 27) as "rough and hilly", "affording only a somewhat scant pasturage for about two months in the early spring".

Likewise there is not a line of testimony showing that any cattle were kept from the government territory by the fences on these private lands of the company. Contrary to the government's contention of an exclusive user by the company, it appears and the lower court found that the neighboring stockmen have often grazed on the land in question since the fences were erected and that in 1910, over 200,000 sheep were driven from the southwest to the northeast across appellee's land. This finding is based on the testimony of the stockmen themselves, and the evidence of the different brands, over eight in number, some coming from ranches over sixty miles away (169, 655, 656).

Having thus shown the physical conditions prevailing and the intent of the company in fencing its own lands, we will now consider the questions (1) Whether Congress intended that such a fencing of one's own land constitutes an enclosure within the meaning of the act, and (2) Whether Congress has the power to take from

the defendant without compensation the twenty odd lanes of its land necessary to give the twenty places of convenient access to the government land beyond.

II.

DO THE FENCES ON DEFENDANT'S PRIVATE LANDS, WITH THEIR FOURTEEN OPENINGS AND TWO CROSSING ROADS AND A THIRD PASSING BY, CONSTITUTE AN ENCLOSURE WITHIN THE MEANING OF SECTIONS 1 AND 2 OF THE ACT OF 1885?

The lower court, after fairly describing the openings, though failing to note that the 3400-foot gap was alongside the county road, says:

“While defendant has undoubtedly sought to keep within the law, I am satisfied that the openings on the north, west and south are not sufficient under present conditions to afford reasonable and proper access to the land in question. Most of the gaps, particularly the long one, are at and toward the east end of the field. Those on the west and south are insufficient, under present conditions.”

Transcript of Record (small volume), p. 30.

The question then is, Does a series of fences which are sufficiently open on the easterly end by gaps a mile and a quarter and 3400 feet long, respectively, at their northeasterly and southeasterly boundaries, become an *enclosure* because on the other sides the openings across defendant's private lands, though free and unobstructed, may cause an inconvenience of travelling a distance of not over two and a half miles to reach them? Or, in other words,

Does a body of land become *enclosed* within the meaning of the act when it is accessible by fourteen openings and two crossing roads because if there were more openings across the surrounding private lands, it would be more convenient for the public? Or, in other words,

Must a person whose lands, with others, surround government land, open up rights of way across his own land to the *convenience* of the public, or is the criterion of the statute whether there be a sufficient number of openings so that it cannot be said that the public are excluded from reaching the land?

If Congress intended convenience of accessibility to be paramount to the right of private ownership, then there is a vast territory enclosed in violation of the act by the Western Pacific and Central Pacific Railways in the Humboldt Valley, Nevada. These roads cross each other and diverge and approach till they are a very short distance apart. They are fenced over a large portion of their right of way and for long distances neither has an opening anywhere near as large as 3400 feet, save in the towns, where cattle would not travel. And yet would anyone for a moment contend that the fences of these two roads constitute an enclosing of the public land within the meaning of the act, because a settler or a ranging steer would have to travel five miles to find an opening across the track and, when he found it, it was only 30 feet wide? Have Mr. Harriman and the gentlemen of the Gould family been guilty of a misdemeanor in maintaining such railway fences?

It is of no avail for the lower court to discuss the efficiency of a single 20-foot opening in forty miles of fence as changing the nature of an enclosure, for it offers no analogy to the case at bar. Here the openings are on every side. On the west, south, southeast and east openings 1, 7, 6 and A (Ex. 1) are next to or actually admit the only highways the country is shown to have. On the northeast for a mile and a quarter, the opening carries the many cattle trails into the higher summer range beyond.

What the lower court has decided is that a series of fences with numerous gaps between them, which certainly will neither hold cattle in nor out, and which gives free access to settlers at all travelled roads and a dozen places besides, is an enclosure because at other places, in protecting the private land they were built to enclose, it is an *inconvenience* to travel to the next opening. It has in effect decided that any fencing of private lands which it is an inconvenience to go round is an enclosure within the meaning of the act.

This act has been before the courts since the decision of *Camfield v. United States* in 1897, and in no case has it even been intimated that the criterion for determining the existence of an enclosure is mere convenience of accessibility from all sides. *In no case has it been held that there was an enclosure where there has been a single accessible and convenient opening.*

One of the most significant of the opinions is that given by Judge Gilbert, speaking for this court, in *Thomas v. United States*, 136 Fed., at 159, a decision relied upon by Judge Hunt as showing the nature of

an enclosure in violation of the act. In that case over 50,000 acres had been enclosed, and at least thirty miles of fencing built. It was contended that in this long line of fence there were two openings, one of three-quarters of a mile, where a canon intervenes, and another at a lake which at low water in the late summer would permit the passage of cattle. Instead of holding that two openings in a fence thirty miles long would be insufficient in any event, the court enters into a consideration of the accessibility of the openings and holds that they were a mere sham. It is clearly apparent from the *ratio decidendi* that if they had been fair openings, or either had been, the court would not have held that there was an enclosure. Judge Gilbert says:

“It is shown, also, that there is a gap of three-quarters of a mile in the fence at a point where a canon intervenes. It is admitted that the canon is impassable at that point; but it is said that cattle, by going three miles down the banks of the canon, can enter the canon, and then by going up the canon, can get within the inclosure. It is not shown how far they would have to proceed within the inclosure before they could emerge from the canon. It is absurd to say that this is an opening in the inclosure. It was evidently left unfenced because it could not be fenced, and because it was deemed unnecessary to make other provision against cattle entering through the canon. Nor can the appellant maintain that his inclosure is not complete by showing that by the 1st of September in each year cattle may, if they possess sufficient intelligence or are driven there, go around the ends of the fences which extend into the lake. There is no evidence that cattle or stock of any kind ever entered the inclosure through these so-called open-

ings. The whole contention *that there are openings in the inclosure, and that therefore the appellant is not amenable to the law*, is so plainly without merit as to require no further discussion.”

Thomas v. United States, 136 Fed. 159, at 161.

In our case there were openings between the fences on all sides, unobstructed and at accessible places—fourteen of them, four alongside three different roads—one 3400 feet long, one a mile and a quarter long. There is abundant evidence that cattle of many brands from as far as sixty miles away entered through them on to the government land.

It is apparent that Judge Hunt believed that he had brought this case under the reasoning of the *Thomas* case when he found (opinion, p. 13) with such particularity (though erroneously) that the 3400 foot opening, instead of being in a gentle valley alongside the Midas-Tuscarora and the Tie Corral roads, is hidden away “at the foot of a mountain where the country is rough”, and which can be reached by the settler only “if he follows along miles of fence and turns in and goes over the rocky place”. He would also have been within the *Thomas* case if it had been true that the opening of a mile and a quarter at the northeast end, instead of being free and unobstructed and full of cattle trails, was almost closed by North’s fence which, though down in places, still had its wires on the ground* (opinion, p. 13).

* The error in the opinion was undoubtedly due to the fact that on the government map a straight section line crosses the opening which, according to the legend, also denotes a fence.

It would also have been a reprehensible sham within the Thomas case if the openings in the North fence, which in fact was in another place, had been crossed with wires on the ground (opinion, p. 13), instead of the wires being rolled up (as they in fact were), and we had represented this to the court as affording adequate access.

The opinion might also have been within the Thomas case if all these openings had been mere inaccessible shams and the eleven others had been too "narrow" (opinion, p. 13) for cattle or teams to enter, instead of all of them being as large (100 feet) or larger (up to 300 feet) than the size ordered by the lower court, and three with wagon roads running through them.

It is manifest that Judge Hunt would not spend his time in describing the inaccessibility of these openings and the obstructions in them if it made the fencing none the less an enclosure had they been at accessible places and unobstructed. We take it that the *ratio decidendi* of the opinion against us based on the erroneous findings of fact, compels a decree in our favor when the facts are found as the undisputed testimony shows them to be.

In *Homer v. United States*, 185 Fed. 741, a case we treat further under the question of intent, it is squarely held that *one* opening in a fence twenty-five miles long makes it unobjectionable under the section of the act invoked here. And this is not determined in passing on the condition of the fence at the time of the filing of the suit, for the court finds a complete inclosure, but by the

order of the court itself in opening up the inclosure. In this case there was an outside fence on the defendant's land which also enclosed two parcels of government land inside defendant's. Each of the government's pieces was surrounded by a separate fence on the boundary line between the government and defendant. The inside fences were ordered abated, thus leaving the entire tract surrounded by the single twenty-five mile fence. The court ordered:

“That such *an* opening should be made in the general enclosure as will allow free ingress and egress to the public lands in question.”

Homer v. United States, 185 Fed. 741 at 747.

“Free ingress and egress” is then to be had through one opening in a fence twenty-five miles long. Free access from all sides, the apparent criterion of the District Judge in this case, is not even discussed by the court. It is clearly apparent that if the fence in the Homer case had had a 3400 foot gap in a valley alongside two highways, with two roads crossing the government land through unobstructed openings and with eleven other unobstructed openings, ranging in width from a mile and a quarter to 100 feet, the court would not have held that it was an enclosure.

In *United States v. Johnston*, 172 Fed. 635, there were but two inaccessible openings, filled with brush, in many miles of fence around government land. Greater inconvenience or inaccessibility could not be imagined than that found by the court, short of having no openings at

all. Far from making convenience its criterion, Judge de Haven squarely holds:

“That the fence described (as above) does not constitute an unlawful enclosure of public lands within the meaning of section 1 of the act.”

United States v. Johnston, 172 Fed. 635.

We therefore submit that if a series of fences have a number of convenient and accessible openings at all the places of general travel and many others on all sides of the territory in question, it does not become an enclosure because at some places the fences built to protect private land may possibly cause the inconvenience of traveling to the next opening.

THIS COURT'S REVERSAL OF ITS POSITION AS TO INTENT.

Four judges in this circuit have given opinions or instructions making *intent* the criterion in determining whether a fence enclosing in private land violates Section 1 of the Act of 1885 by enclosing government land or Section 3 by obstructing access to it. These four judges are Judges Ross, Morrow, De Haven and Wolverton. Two other judges have concurred in one or another of these opinions—Judges Gilbert and Hanford.

The most striking case is the recent one of *Hanley v. The United States*, 186 Fed. 711, known as the Harney Valley case. The question as to what constituted an enclosure was directly before this court, Judge Ross in opening his opinion saying:

“The plaintiff in error was defendant in the court below to an indictment containing two counts, the first of which charged him with unlawfully maintaining and controlling certain fences, which, together with natural barriers and cross-fences, inclosed a large body of public land of the United States situated in Harney County, State of Oregon.”

Hanley v. United States, 186 Fed. 711.

Judge Ross then restates the rule in the *Camfield* case coupling it with the *Potts* case in which intent is the sole criterion, as follows:

“Any person may lawfully fence or otherwise inclose his own land, and may connect his fence or inclosure with that of an adjoining landowner, provided he does so in good faith. When, however, under the guise of inclosing his own land, he constructs or maintains such a fence or inclosure for the purpose and with the intention of inclosing public lands of the government, the act is unlawful. *Camfield v. United States*, 167 U. S. 528; 42 L. Ed. 260; *Potts v. United States*, 114 Fed. 52.”

The opinion then considers the instruction of Judge Wolverton in the trial in the lower court in which intent is squarely made the criterion to determine whether a fence without any openings in it at all, which crosses all the county roads and leave gates in only some of them, is in fact an enclosure within the intent of the act. Judge Wolverton’s instruction set forth in Judge Ross’ opinion was in part as follows:

“ * * * The intent or purpose with which fencing or an inclosure was constructed or maintained, if so constructed or maintained, may be gathered from all the testimony showing the local conditions

and environment, the ownership or want of ownership of the lands affected by the inclosure, their occupancy, and the use of which they are susceptible. Men do not build fences or construct or maintain inclosures except for a purpose. That purpose is usually manifest * * *

“A person has a right under the law, to erect fences wholly upon his own land, and to maintain them if he so desires, *and if incidentally such fences may obstruct or impede the ingress or egress of stock ranging upon the public lands, or the free passage of persons upon or over such lands, no one can complain*, because a man has a right to do what he pleases with his own, so long as he does no willful injury to another. But he cannot make the construction of fencing upon his own lands a *subterfuge* for inclosing or preventing free passage upon the public lands * * *

“You are the judges of the *purpose* for which this fencing was constructed in the first place, whether to inclose public lands or not; and, if so, whether it was maintained by the defendant as alleged in the indictment, and, if so, for what *purpose*.”

Hanley v. United States, 186 Fed. 711 at 713, 714.

Passing on this instruction Judge Ross says “this seems to state the law fairly in respect to the point there referred to”. That is to say it is the law that one may “incidentally obstruct or impede the ingress or egress of stock ranging over the public lands, or the free passage of persons upon or over such lands” if the fence is primarily built to protect his own lands. It is only when the fence becomes a “subterfuge for inclosing or preventing free passage upon the public lands” that it becomes unlawful. It is for the jury to

decide “the *purpose* for which the fencing was constructed” and to determine “for what purpose”.

Could there be a clearer or more unequivocal statement of the law? Could it be said that Judges Gilbert and Hanford were deluded by any obscurity of the opinion in giving their concurrence?

The Potts case on which Judge Ross relies in the Harney Valley case is also a decision by this court. Judge Morrow wrote the opinion, Judges Gilbert and Ross concurring. That was a prosecution involving the third section of the act, and the question was whether the intent of the defendant in maintaining a fence which, though enclosing the defendant’s land, unquestionably shut off access from the county road to the government land was a determining factor in the case. The facts offer an interesting contrast to the case at bar where the roads enter and leave the land though unobstructed openings and large gaps were left near the roads for the deliberate purpose of affording access.

The instruction of the lower court which this court held erroneous read in part as follows:

“The law is broad in its terms, and it is intended to prohibit any manner of inclosing the public domain by a person or a company or a corporation that has no color of title or right to have the exclusive use of it. The inclosure by a fence, or a combination of fences, or joining of fences that is wholly upon the land which the person does own, is unlawful, if in effect it does inclose and shut out the public from any part of the public domain. A man has no right to build a fence upon his own land, that connects with another fence, that is so

connected as to form an inclosure of public land, and shut the public out, or prevent their passage over the public lands.”

Potts v. United States, 114 Fed. 52 at 54.

Commenting on this Judge Morrow says:

“By a well-known rule of construction the words ‘or any other unlawful means,’ in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words ‘fencing’ and ‘inclosing’, so that those words must be read as ‘unlawful fencing’ and ‘unlawful inclosing.’ In other words, the ‘fencing’ or ‘inclosing’ of land does not become unlawful merely because either of these acts prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on a tract of the public land subject to settlement or entry under the public land laws of the United States. The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when, under the *guise* of inclosing his own land, a person builds a fence *for the purpose and with the intention of inclosing the public lands of the government, that the fence or inclosure becomes unlawful.* * * *

“The fence of the defendant, connecting with the fences of other owners, had formed a chain of fences which presented a barrier between the public lands in question and the county road. It is evident that this portion of the country is not well populated, and that public roads are few, as the greater part of the public lands claimed to be unlawfully enclosed by the fence in question is two miles from the county road. Upon this evidence it was clearly the duty of the court to submit to the jury the question whether the defendant’s fence or inclosure *was erected by him in good faith to in-*

close his own lands, or whether, in joining his fence to that of others, it was his intent and purpose to prevent or obstruct any person from peaceably entering upon, or establishing a settlement, or residence upon, the tract of public land described in the indictment.

“This the court did not do, but instructed the jury that a fence built by a person upon his own land was unlawful, if in effect it inclosed and shut out the public from any part of the public domain. This instruction, as a statement of the law upon the subject, was too broad, and was therefore subject to objection.”

Potts v. United States, 114 Fed. 52 at 54 and 55.

In *United States v. Johnston*, Judge De Haven holds that a fence which was practically an enclosure was not unlawful because:

“Second. The lands described in the complaint as belonging to the United States are of little value, and the main purpose for which the defendant maintains the fence described in finding No. 1 is to keep stock belonging to other persons from straying upon the land owned by him and to keep his own stock upon said lands, although all of the public lands described in the complaint lying between said fence and the ranges of mountains on the north and east with which said fence connects are used by the defendant as a range for his cattle in connection with the lands owned by him.

“Third. The defendant does not assert any claim or title to the public lands described in the complaint, and the fence, mentioned in finding No. 1, is maintained by him because by so doing he is enabled to sufficiently inclose the lands owned by him to keep his own stock on, and the stock of others off of, said lands at less cost and expense to

him than would be required to inclose his lands on all sides by an artificial fence.”

United States v. Johnston, 172 Fed. 635 at 636 and 637.

Could any court have put itself more clearly of record as to the paramount importance of intent in these cases than this Court of Appeals of the Ninth Circuit? And yet we have these opinions of Judges Ross, Morrow, De Haven and Wolverton treated as mere idle words in an opinion which squarely holds that intent has nothing to do with it, and that a fence violates the section of the act against inclosing if it even inconvenience those desiring access no matter how necessary it may be to protect the defendant's lands.

Both Judges Ross and Morrow rely upon *Camfield v. United States*, 169 U. S. 518, for their interpretation of the act as making unlawful those obstructions which, under the guise of protecting private rights, are in fact intended to accomplish an exclusive appropriation of public land and to exclude others therefrom.

The *Camfield* case came up from the 8th Circuit where the Circuit Court of Appeals held that intent played no part once an inclosure of government land was shown. The opinion is about three-quarters of a page long.

On appeal the Supreme Court gives pages to the exposition of the bad faith of defendant in erecting a fence that would not aid in inclosing much of the private land of defendant and obviously was erected to make an exclusive appropriation of the government

land. Not only that, but it goes into the history of the legislation and finds precedent for the congressional act in a statute of the State of Massachusetts making a fence on a man's own land a nuisance if "*maliciously* erected or maintained for the purpose of annoying the owners or occupants of adjoining lands".

Speaking of the history of the legislation Mr. Justice Brown says:

"But the injustice of the prevailing doctrine upon this subject, in its practical operation, became so manifest that, in 1887, the legislature of Massachusetts passed a statute declaring that any fence 'unnecessarily exceeding 6 feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property', should be deemed a private nuisance, and that any such owner or occupant who was thereby injured in his comfort, or in the quiet enjoyment of his estate, might have an action of tort for the damage. The constitutionality of this statute was attacked in the case of *Rideout v. Knox*, 148 Mass. 368 (2 L. R. A. 81), but upon full consideration, the supreme judicial court was of opinion that the statute was within the limits of the police power, and was constitutional; and, although the fence was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit, beyond which it was not lawful to go. The court also held the statute to be constitutional with reference to fences already in existence when the act was passed; that although it involved, to a certain extent, the taking of property without compensation, yet, 'having regard to the smallness of the injury, and the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also

to the fact that police regulations may limit the use of property in ways which greatly diminish its value', the court was of opinion that the act was constitutional to the full extent of its provisions."

Camfield v. United States, 167 U. S. 518 at 523 and 524.

Seeking its justification in an act which makes the unlawfulness consist in "malicious intent" to annoy a neighbor and in the "malevolent purposes" of the fence, the court goes on through page after page to comment on the sham and *mala fides* of the defendant, saying:

"The device to which defendants resorted certainly was an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd numbered section, there can be no objection to them; but so far as they were erected immediately outside the even numbered sections, they are manifestly intended to enclose government land. Considering the *obvious purpose* of this structure and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve entry upon the lands of a private individual (p. 525).

* * * * *

"It is no answer to say that if such odd-numbered sections were fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting

away the odd-numbered sections. So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, *regardless of any detriment to his neighbors*, but when, *under the guise of enclosing his own land*, he builds a fence which is useless for that PURPOSE, and can only have been INTENDED to enclose the lands of the government, he is guilty of an unwarrantable appropriation of that which belongs to the public at large." (pp. 527, 528.)

Camfield v. United States, 167 U. S. 518 at 525, 527, 528.

Can it be possible that the Supreme Court meant, after all this discussion, that no matter how honest an intent a man may have had in enclosing his own land, and how entirely free he might be from a desire to make an appropriation of the government land accidentally enclosed by his fences, intent was no defense? Certainly Judges Ross, Morrow, Gilbert and Hanford did not so understand the *Camfield* case in invoking it in the *Potts* and *Harney Valley* cases in which the intent was held to control.

The Eighth Circuit, in *Homer v. United States*, 185 Fed. 741, holds to its earlier position that intent has nothing to do with the violation of the act. Judge Van Devanter vigorously dissents from the majority opinion, relying on the portions we have cited from the *Camfield* case and *Potts v. United States*. As the *Harney Valley* case was not decided till two months later than the *Homer* case, Judge Van Devanter did not have this latest expression of the Ninth Circuit,

and, up to this case, of all the circuits, to add to his authority.

It is submitted that the Ninth Circuit is right and that their opinions and Judge Van Devanter's dissent in the Eighth Circuit correctly state the law as it really is—namely, that where, as here, the good faith of the defendant is shown by his large openings near the travelled roads, and numerous others on all sides, and when the lower court finds that he really intended the fences to protect his own lands, no enclosure has been made in violation of the act.

III.

THE GRANTING OF TWENTY RIGHTS OF WAY ACROSS THE GRAIN AND ALFALFA FIELDS IN PROCESS OF DEVELOPMENT, AND THE CONSEQUENT NECESSITY FOR FENCING THESE RIGHTS OF WAY IS A TAKING OF PRIVATE PROPERTY FOR A PUBLIC USE NEVER INTENDED BY CONGRESS AND PROHIBITED BY THE CONSTITUTION.

We have before shown that practically every acre in the bottoms belonging to the defendant is rich arable land. It is not disputed that a large portion of this area was already under cultivation and that the building of the remaining inside fences was actually in process when this suit was begun. The effect of the court's decree therefore must be considered with a view to the immediate use to which the lands were to be put. That is to say, as we are entitled to enclose our lands on all sides, and as we were engaged in doing so at the time the suit was commenced, the court has

no more right to cause us to make additional openings in the uncompleted fences on the one side of the lands than it would have if the fence were on all sides of the land.

The decree requires twenty openings in the fence, of a hundred feet in width, so placed that there are required thirteen in addition to the thirteen now existing. It is apparent this means that unless these openings are fenced clear through from the outside to the inside of the company's lands, they will admit everyone's cattle to the grain, alfalfa, or potato fields of the defendant. Now this effect of the decree must be construed as well as its mere words, in determining whether it is warranted by the law. The question is, can the court, in the guise of abating fences on private land, having all the many accessible and unobstructed openings we have before described, require the owner to surrender thirteen additional strips of land 100 feet wide and from a quarter of a mile to a mile and a half across its cultivated lands, to make the access of straying cattle more "convenient"?

The continuity of these fields of alfalfa for purposes of grazing is entirely destroyed. No field can be more than a mile and a half long, an absurd limitation when one considers the universal practice of handling cattle in large numbers. If one is to use the stubble of the grain after harvest a very large number of herdsmen must be kept to hold the cattle as they range from one field to another across the right of way to the government land. Of course these men, two for each right of

way, could be used to hurry the straying cattle of strangers across the rich bottoms of the defendant, but it is apparent that such a cost, not less than \$80 per month for each right of way, or \$1600 per month for the 20 strips ordered by the court, is prohibitive.

It is obvious that this is an invasion of property rights, and could be justifiable, if at all, only under the police power. Otherwise it would involve the taking of private property without due process of law. And in any event, it would constitute the taking of private property (in the present case the lanes themselves, one hundred feet wide and, in some cases, over a mile long, would amount to many acres) for public use, without compensation. Appellant is forced to dedicate roadways apparently of considerable value across rich agricultural lands to the public use, without one cent being returned to it, and this is in addition to many free means of access already gratuitously afforded. This feature, we submit, seems not to have been considered in the case of *Homer v. United States*, even in the dissenting opinion of Mr. Justice Van Devanter (then Circuit Judge), and was not involved in the case of *Camfield v. United States*. But from the latter case a few quotations are enlightening upon this, and other points, showing how the Supreme Court would have distinguished that case from the one here under consideration.

* * * * *

“There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the maxim ‘sic utere tuo ut alienum

non laedas'. His right to erect what he pleases on his own land will not justify him in maintaining a nuisance." (page 522.)

* * * * *

"The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd numbered section, there can be no objection to them; but so far as they were erected immediately outside the even numbered sections, they are manifestly intended to enclose government land. Considering the obvious purpose of this structure and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve entry upon the lands of a private individual." (page 525.)

* * * * *

"Indeed, we know of no reason why the policy, so long tolerated, of permitting the public lands to be pastured, may not still be pursued, providing herdsmen be employed or other means adopted by which the fencing in and exclusive appropriation of such land shall be avoided." (page 527.)

* * * * *

"It is no answer to say that if such odd-numbered sections were fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive

enjoyment of it, regardless of any detriment to his neighbor, but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the government, he is guilty of an unwarrantable appropriation of that which belongs to the public at large." (pages 527, 528.)

From this it appears that the Camfield case was decided upon the ground that these fences erected to effect a purpresture and for no other purposes, were a *nuisance*, and as such should be *abated*.

In addition to the fact that the Camfield case presented an outrageous appropriation of government land, it appears that the reasons why the court denominated the fence a nuisance, and so was justified in a nominal invasion of property rights, were as follows:

1. It constituted a use of one's own property for the sole purpose of obstructing another (the government) in the enjoyment of its property, and of appropriating that property.

2. It accomplished this malevolent purpose.

3. The public had the right to be secured, by abatement of the fence, in its property right to use of the government land *so long as the defendant* (Camfield) *was not deprived of his right to protect in good faith his own property from trespass*. This latter is the uncontrovertible conclusion from the remarks of the court, at page 527, affirming his right to fence each section belonging to him, even if by so doing he incidentally cut off access to the government land.

Upon these grounds, and upon these only, could the court denominate the fence a nuisance, and even then it must be admitted that the term was as generously used as possible.

But in the present case we have a totally different situation. 1. Here the purpose was bona fide protection of appellant's own property. 2. The result accomplished was the legitimate protection of its property. Even had there been exclusion, which there was not, it would have been the exclusion expressly permitted by the opinion in the Camfield case. 3. The abatement of the fence in the Camfield case worked no injury, nor even harm, to Camfield, nor did it purport to donate a right of way to the public across Camfield's land. In the present case, large quantities of appellant's land are taken from it and given to the public, and it is absolutely inhibited from the exercise of the fundamental right of all property—the right to protect from trespass.

We have called attention to the importance which is given to the *intent* in both the Camfield and Potts cases. It is quite apparently a *sine qua non* of the nuisance in each case. We are not called upon to consider whether this is the more general rule in the case of nuisances, though the Massachusetts cases cited by the Supreme Court, and upon which it, to a large extent, bases its opinion, are founded upon a statute which makes malice an element of the class of nuisances there inhibited.

When we turn to the present case, however, we find complete absolution in the trial court from any intent either to inclose or to appropriate.

Assuredly the doctrine of nuisances invoked with excellent justice in the *Camfield* case has no application here.

Primarily

“a fair test as to whether * * * a particular use of property constitutes a nuisance is the reasonableness or unreasonableness of the * * * making use of the property complained of in the peculiar locality and in the manner and under the circumstances of the case, and where the use made of his property by the person complained of is not unreasonable, it will not, as a rule, be enjoined, nor can a person complaining thereof recover damages.”

29 Cyc., 1156-1157, and cases cited.

As has been seen, it was exactly upon this reasoning, and after a determination that the use of the fences there involved was to accomplish a purpresture, that the Supreme Court declared the *Camfield* fence a nuisance.

Again, to constitute an abatable nuisance, somebody must have been not only damaged, but also injured. (*Tiedeman, Limitation of Police Power*, sec. 122a. *First National Bank v. Sarlles* (Ind.), 28 N. E. 434.) It cannot be contended that, however broad the right to graze cattle upon the public domain may be there is any *right* on the part of any private person to trespass upon the private land of another, unless the right of the second person to protect his land has been taken away from him by due process of law.

Now the police power takes its vitality from the “over-riding” necessity of the public health, comfort or welfare, and is not to be invoked, at least to the detriment of constitutional guaranties, unless there is no

other feasible method by which the public health, comfort or welfare may be preserved. "Under the pretense of prescribing a police regulation", says Mr. Justice Field, in the "*Slaughter House Cases*", 16 Wall. 36-87, "the state cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgement". "An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands", says *Tiedeman on the Limitation of Police Power*, sec. 122, "is a taking of private property without due process of law, which is inhibited by the constitution".

It is certainly true in the present case that the *fence* is not the real nuisance, nor a cause of injury, but that the inconvenience and annoyance to the government and to the public (always supposing that no means of access to the public domain had been provided) *resulted solely from the rights of the appellant to the exclusive enjoyment of its own land* and from any method which it might adopt in a *bona fide* effort to protect these rights. To abate the fence alone can avail the government nothing, since the owner still has the right to keep strangers from grazing across his land. Abatement is of no value *unless in conjunction with such abatement it can appropriate without compensation large areas of private property and deprive the owner of the exclusive use thereof.*

Ordinarily it is only by the exercise of eminent domain that private property may be appropriated to public use, and it is only in cases of "great emergency, engendering overruling necessity", that the police power

may justify a taking of private property without just compensation. Otherwise the property must be purchased. *Yates v. Milwaukee*, 10 Wall. 497. The police power itself must be exercised in subordination to the constitution. *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

The following is quoted from *Hollingsworth v. Parish of Texas*, 17 Fed. 109, at 113, 114:

“In Louisiana, as well as in all the states, the implied powers are sufficient to warrant the imposition of this service on lands adjacent to navigable rivers, and the imposition of such service may be the offspring of a wise public policy; but does it follow that there is, in the state or federal system, any power outside of and apart from the eminent domain right to lawfully, by direct or implied legislation, take any private property, or take the use of it, or so damage it as to deprive the owner of its use or profits, with or without compensation?

“The United States Supreme Court, in 6 How. 532, says:

“That in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large * * * This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government * * * and must yield, in every instance, to its proper exercise * * * In fact, the whole policy of the country relative to roads, mills, bridges, and canals rests upon this single power, under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed.’

“The same court, discussing the same principles (91 U. S. 367):

“No one doubts the existence in the state governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. * * * The right is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law.’

“It is observable that the right of eminent domain and the police power, though well recognized attributes of political sovereignty, are distinctive in the purpose and extent for which the legislature may exercise them, and neither is ever free from the restraints or limitations of the fundamental laws. Laws passed under a proper exercise of these respective powers have often been considered by the federal courts, and their distinctive purposes and application recognized. To some extent these courts differ as to the basis of the eminent domain right, some of the decisions citing the power as resting on political necessity; some on the tenure of lands and implied compact; but I think no federal authority can be cited as a precedent for taking or appropriating the use and control of private property under any other power, expressed or implied, than ‘this single principle’ of eminent domain, upon which it is well known that the policy of the country in relation to public works rests in one state as well as in another. 6 *How.* 532.

“These courts have uniformly held that the police power is a different ‘prerogative power’, and extends only to regulating the owner’s use and dominion of private property, not to taking from him or dispossessing him of its use and control.

“ * * * Dillon, *Mun. Corp.* 593, discussing the same question, says:

“These police powers rest upon the maxim *salus populi est suprema lex*. This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not taking private property from the owner, but a salutary

restraint on the noxious use by the owner, contrary to the maxim *sic utere tuo ut alienum non laedas.*'

"Both of these powers are equally clear in the common law; but neither of them can be said to warrant the legislature in imposing, directly or impliedly, without compensation, such an easement or servitude as defendant herein claims. The supreme court having held in the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, that the taking of property in the meaning of the prohibition clause in the Wisconsin constitution, similar in language to article 156, was sufficiently established to warrant indemnity where it was shown that any 'artificial structure was placed on the land, so as to effectually destroy or impair its usefulness to its owner,' or when it was shown that plaintiff's land was covered with water in consequence of the back water from a milldam, which was built according to state statute, went on to say:

" 'We do not think it necessary to consume time in proving that when the United States * * * parts with the fee, by patent, without reservation, it retains no right to take that land for public use without just compensation; nor does it confer such a right on the state within which it lies; and that absolute ownership * * * is not varied by the fact that it borders on a navigable stream.'

" 'This is the common-law doctrine as to easements, and this decision and others, notably the 51 N. H. 504, establishes the law as to what amounts to a taking of private property under the common-law rule, which is emphasized in article 156, State Const. 1879.'"

This rule certainly applies to the present case—there is no such "great emergency" here that it should be departed from.

The condition which led up to the Act of 1885 are well shown by the instructions issued by the Secretary

of the Interior just prior to the passage of the act (Instruction, 2 L. D. 640; see also the case of McKittrick and Andrews, 2 L. D. 638, upon which the instructions are apparently based). The evil sought to be remedied was the exclusive appropriation of large areas of the public domain without claim of title, by means of force, intimidation and fences. Never could it have entered into the consideration of Congress that any court could find in its act any authority to deprive a land owner of valuable property rights. No question of rights of way over private lands was in contemplation. True, the court in the Camfield case, considering the policy of the government, that its domain should be appropriated only in accordance with the public land laws, interpreted the statute in connection with the further doctrine of *nuisance* and thereby procured most substantial justice; but neither Congress nor the Supreme Court has ever intended to enact in the statute, or interpret into the statute, an intent on the part of the United States to appropriate valuable private property under the guise of a police regulation.

It is therefore submitted that (1) as the erection and maintenance of the fence lacks the intent to and does not make an exclusive appropriation of public lands and was intended to and did protect private property it is not a nuisance and cannot be *abated*; (2) as no right to abate as a nuisance exists the court has no right to order openings with the appropriations of rights of way over private land from the fencing necessary to protect the remainder of that land.

In conclusion we summarize the law points in our brief as follows:

1. The series of fences and fenced fields with all its openings, gaps and their accessibility to the through-roads is not *physically* an enclosure within the meaning of the act. The mere inconvenience of traveling around defendant's fields to the next opening does not make the series of fenced fields such an enclosure.

2. The series of fenced fields and fences if made with the *intent* of enclosing defendant's private land and only incidentally (if at all) impeding ingress or egress to the public land, is not an enclosure even if in the absence of a proper intent such a mere interference could be deemed an enclosure.

3. The fence in the absence of improper intent is not a nuisance, and the court's order for 20 openings is not an abatement but, with the 20 consequent rights of way which must be fenced, is a taking of private property for public use without compensation.

Respectfully submitted,

WILLIAM DENMAN,

CHARLES R. LEWERS,

Solicitors for Petitioner.

G. S. ARNOLD,

Of Counsel.

No. 2143

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GOLCONDA CATTLE COMPANY
(a corporation),

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING. WITH AN APPENDIX IN PARALLEL COLUMNS.*

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The merits of this appeal have never been argued in this court either on the law or the facts. It was our impression from the argument on the motion to dismiss that the findings of fact made by the lower court were to be accepted here and the brief of the government is also written on that theory. The opinion of this court, although setting forth some of the findings of the lower court and ignoring others, proceeds to restate them in discussion in a way which shows that the court does not accept those findings it has quoted, nor

*Appendix showing mistakes of the opinion, page 28 infra.

the government's exhibit, nor that of the appellant. Whether a rehearing be granted or not, a great injustice has been done the appellant in misstatements of facts agreed upon by both parties, and in omitting facts not contradicted by the government, all bearing on the accessibility of the government land and the purpose of the fences—an injustice which, we submit with all deference, can only be repaired by altering certain of the statements of the opinion.

Nor does the opinion mention the principal argument relied on by counsel—namely, the effect of granting twenty rights of way one hundred feet wide and from a quarter of a mile to a mile and a half long, across the land of appellant—rights of way which appellant must fence or let its rich bottom lands be open to the wandering bands of cattle from a radius of over fifty miles.

None of these things could have occurred, we believe, had the case been argued to the court on its merits, and we hope to show in this brief not only that such an argument is required to correct an injustice in the statement of fact, but that the court has erred as to the law in its decision, and is in plain violation of the *ratio decidendi* of the Camfield and other cases. We first point out what we feel certain are errors of fact, because they may throw more or less light on the questions of law, though the latter, of course, are of primary importance in this petition. A large part of the time of the hearing was taken up with the motion to dismiss. If full argument on the merits had been

undertaken the case would have laid over till the October term, as the calendar was full and the court to adjourn in a few days. As the company hoped to finish its fencing of its fields this summer the matter was submitted on the briefs.

I.

**ERRORS OF FACT AS TO ACCESSIBILITY AND USEFULNESS OF
THE PUBLIC LAND AND AS TO THE PURPOSES OF THE
FENCES.**

Some cases acquire an atmosphere which invests all other matters involved in them. What was primarily in the mind of the writer of the opinion is undoubtedly expressed in the following lines:

“That is to say, the Golconda Company, by maintaining miles of fence *along only the outside* of its own *eleven thousand acres* and connecting such fences with natural or other barriers, has separated one immense tract consisting not only of eleven thousand acres belonging to it, but also of twenty-six thousand acres of public land. The *serious significance* of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise one hundred and sixty-two homestead entries.”

Opinion, page 12.

These lines must be considered in connection with the earlier remarks concerning the history of the development of irrigation of the lands away from the river bottoms and their settlement for farming purposes.

And yet, when we come to examine the record, we find that these government lands are worthless for purposes of settlement. The district judge, who is himself familiar with this territory, says:

“The government land is *all rough and hilly*; it has a general slope toward the southwest, as well as an inclination from the central high land toward Willow Creek on the south, and to Rock Creek and Toejam Creek on the north and west. It affords only a *somewhat scant pasturage* for about *two months* in the early spring.”

Opinion, page 4.

Settlers are not going to plant farms at an elevation of between six and seven thousand feet above the sea, on land which naturally “affords only a somewhat scant pasturage for about two months in the early spring”. Nor are those poor and timid individuals going to invest their money in an irrigation system to put water on land which is “all rough and hilly”.

There is not a line of evidence in the case to show that any settler ever attempted to locate on the government lands in question, and it is absurd to suppose that any would. We do not believe that if we had had an argument of this case, the court would have laid the stress it did on the “serious significance” of the fences with reference to the “one hundred and sixty-two homestead entries”.

Another error of fact into which the court slipped is in regard to the location of the fences and the purposes they would serve. The court says:

“It is *not disputed* that the fences are along the *outside*, and not the *inside* of the cattle company’s lands.”

“That is to say, the Golconda Company, by maintaining miles of fence *along only* the outside of its own eleven thousand acres”, etc.

Opinion, pages 4, 12.

Not only is this fact disputed, but the evidence is incontrovertibly the other way. These bottom lands are rich and cultivable. Many of them had already been fenced on *both sides* and under cultivation, and *all* were in the process of being fenced on both sides, the wire was bought, the surveys made, and the stakes set for the line of fence posts. That is to say, instead of it being undisputed that the fences are ~~not~~ ^{only} along the outside of the cattle company’s land, it is undisputed that they were on the inside as to a large acreage of the land, and in process of construction as to all the land.

If there had been an argument, we would have learned that the court was going behind the findings of the lower court and the following uncontradicted evidence on this point would have been called to its attention:

“Q. Mr. Osborne, you testified regarding this fence here, running from T. 39 north, range 47 east, down to Opening No. 1. Is that fence an isolated fence, or is it a part of an enclosure to the westerly, which inclosure is inclosed *on the east side* by that fence?

A. That fence is the east, and part of the north of a field of 1600 acres, company land.

Q. When was that inclosure built?

A. That was built in the spring of 1909.

The COURT. Q. Is that the inclosure south of the Midas road?

A. Oh, no, that is the Fraser Creek country; that is up in what is called the Fraser Creek country.

Mr. DENMAN. It is right north of the Midas road here. Sketch in, if you will, this field of which that fence I have just described is the easterly boundary."

Record, page 164.

"A. Well, I don't know as I could just exactly.

Q. In a rough way.

A. I could give the locality of it.

Q. In a rough way. (Witness draws on plat.)

Q. How far below 'Opening No. 1-150' is it?

A. Oh, that is the lane, it comes to the lane."

"Q. It comes to the lane, and forms the northern boundary of the lane in there?

A. Yes.

Q. Now, I understand that you have fenced that inclosure somewhere around 33, on the north boundary.

A. Yes, a small field.

Q. And you say you planted in there?

A. Barley and potatoes.

Q. What preparations had you made to fence the land running from T. 39 north, range 47 east, around to North's fence on the northerly side of—or around Rock Creek and Toejam Creek?

* * * * *

A. We have the posts and wire at the Dutton ranch to make a field of that now.

Mr. DENMAN. Q. How long ago did you get that wire?

A. Bought that wire about two years ago."

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"Mr. DENMAN. Q. The same thing is true of all the balance of the company's land on those creeks?

A. My orders was to fence the fields, from 40 to 5,000 acres of the company's land, to entirely close it.

Q. These fencing operations, enclosing field after field, have gone on for the last five years, have they not?

A. Four years, while I was with the company."

Page 166.

“Q. What did you make it for?

A. I made the survey in connection with the lands of the company. That is Fraser Creek (indicating); these lands, and these lands up here, lands in what is called the Noble Field, summer range, to find out where such and such lands was. That is what this 22 miles was made for, to find these section corners; them is all quarter corners and section corners set; they have surveyed this line, and set corners, whenever we touched a section corner or quarter corner, we set a rock or post, also on the inside; when we crossed here on a section corner or quarter corner, we set a post. That surveying was all done in connection with this fencing.

Q. Let me ask you: will you testify upon oath that it was the intention of the Golconda Cattle Company to build fences upon the inside of the blue lines, and along the outer rim of those blue lines; will you testify upon oath it was their intention so to do, and that they did actually institute and authorize surveys for that purpose?

A. To run this just as the company's lands run, it was the calculation of the Golconda Cattle Company when they made them surveys to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; *to fence both sides of their land*; I had orders from the Golconda Cattle Company to that effect.”

Pages 190-191.

“The COURT. You had better lead the witness just for that purpose, and find out what he did.

Mr. DENMAN. Q. You had a surveyor in your employ, and had the corner posts set up for the fence along the *north line* of the properties of the company along Willow Creek?

A. I did.

Q. And then you had it surveyed again?

A. Had it resurveyed, that is, retraced.

Q. Retraced. And you think they had put in a portion of the fence around the dam here?

A. Yes, there was other construction when I left, and I have not asked anybody, I don't know whether it is finished, I have not asked anybody.

Q. The same thing is true about Siawappe?

A. Yes, same thing about Siawappe.

The COURT. Q. Mr. Osborne, have you cut any hay in that country there inside those fences?

A. I have inside of their line; yes, sir. They harvested a grain crop of something like 470 acres this year inside of that fence, and it is all seeded to alfalfa, that is on company's land below that red line.

Q. Just point out the place.

A. This country right here (indicating).

Q. What did you have there?

A. There was grain. There was grain and potatoes put in below the dam here, of about, when I left there, probably 15 acres of grain or 10 acres, maybe, I don't know just how much there was.

Mr. LEWERS. 10 acres of what?

A. Grain and potatoes. There also was probably 40 acres of grain and potatoes, mostly grain, put in on Toejam, 30 acres maybe, probably, I don't know.

Q. How many acres would you say?

A. Safely say 30 acres; I never measured it; 22 sacks of potatoes was planted there, I know."

"Mr. DENMAN. Q. That is, you were trying out that country?

A. Well, there was no trying out; we knew we could raise them if they were attended to.

The COURT. Q. Is that the first year you attempted to raise crops on that ground?

A. It was in 1911, yes, that is the *first time we had them protected*, put these other fences up, that is last year was the first year.

Q. Well, have you ever cut any hay down in the southwest corner of the tract, prior to this year; that is, south of the fence?

A. No, sir, not in that direct locality. Now, that was cleaned off, in the brush; the brush cleaned off, I told you, in 1910, and the crop was put in in the spring of 1911, that is a continuous work up Willow Creek, and the other ranch, all west of that for two miles or two miles and half, is alfalfa, and all the other ranch part.

Q. Where do you use the water that is impounded in the reservoir?

A. We use that on the land I am speaking about, take it over that point, over Rock Creek, and to the Mansion field; it is used on this land here just the same, used on the reservoir, then used out again on that field; then take it in the big ditch around a point, take it into another field out in the Mansion field and down into the Lake field, a radius, all told, of probably 20 miles, a ditch."

Record, pages 186, 187, 188.

"Q. Was that the extent of your instructions?

A. Well, my instructions was to put that fence there; all of the Golconda Cattle Company's lands that joined up together, that was practical for grazing or farming, was to fence them *in* and *outside*, then my instruction went on to say, anything that was practical to farm, clean the brush out, clean off the brush and put it in alfalfa, or anything.

Q. When did you commence to build the fences *on the inside*?

A. I commenced in 1909.

Q. When did you quit?

A. I quit the first day of July, 1911.

Q. You quit building fences then?

A. Yes, sir."

Record, page 193.

"Q. Let me ask you about Toejam Mountain; is that properly drawn on there?

A. Well, it don't represent Toejam Mountain at all, the way Toejam Mountain runs, at all.

Q. Does it represent anything in there that looks like it?

A. It doesn't look like Toejam Mountain.

Q. As a matter of fact, Toejam Mountain runs the other way, does it not?

A. The long ridge of Toejam Mountain runs the other way.

Q. Is it not a fact there is a space for a mile or a mile and a half in there, over any portion of which you can drive cattle?

A. Ain't any portion but what you can drive over the summit of Toejam Mountain with horses and cattle.

Q. Is it not a fact, many places you could drive a wagon into this country, going on beyond?

A. A few places.

Q. How about feed in there; is it not a fact that cattle would naturally graze right through this opening out into the country beyond?

A. Yes.

Mr. DENMAN. Q. What is this country beyond—is it a high mountainous grazing country?

A. Fine grazing country.

Q. Now, tell me, what is the—of course I know this is not necessary for this court, but it may be on beyond—what is your natural summer range,—is it in the higher rather than the lower regions?

A. Summer time it is high altitude.

Q. What is the reason for that?

A. Well, better grass, and colder; better grass, the higher up you get the better grass country you get.

Q. How about the condition of the feed?

A. That is in an open range.

Q. That is an open range in here, it is?

A. Yes.

Q. How about the condition of the feed between the point marked 'Opening No. A', and North's fence, running to the northeasterly from there for about five miles?

A. It is just an ordinary slope from these low hills, an ordinary mountain slope, up some steep ravines, and nothing impassable for a buggy or wagon or sheep, or cattle, or anything else to pass over it.

Q. What is the condition of the feed in that country?

A. Bunch grass and sunflowers in summer time close to the mountain, up around the rocks, rocky spaces; have a kind of a sunflower, what we call a sunflower, weeds and such things, fine feed.

Q. Cattle range right up to the summit, and through those rocks?

A. Certainly."

Record, pages 170, 171.

“Q. Do you know, Mr. Osborne, what the purpose of building that entire fence as shown upon the map, was; what was the purpose?

A. Well, there was two or three purposes.

Q. What were they?

A. *One was to steer cattle up to the mountain, and the other purpose was the company's intention of fencing their own lands.*”

Record, pages 213, 214.

“MR. PLATT. Q. Was one of the purposes of this fencing to keep the cattle of the Golconda Cattle Company that might get into this inclosure here of the Government land, from getting out?

A. No.

Q. That wasn't the purpose at all?

A. They would get out.

Q. But the fence wasn't built to keep anything in, was it?

A. No, sir, it was not.

Q. That wasn't the purpose of the fence?

A. No.

Q. Was it built to keep anything out?

A. No, sir, it wasn't built to keep anything out; that is to keep it out, because that—

Q. (Intg.) Then, as I understand you to say, the fence was not built to keep anything in, and it was not built to keep anything out; is that right?

A. **As I said before, the fence was built with the object of helping steer stuff up, and at the same time with the object of building the fence, was for the company to fence their lands.**

Q. **To steer stuff up where?**

A. **Into the high mountains. I tell you, if you were a cow man, a cow man could explain it.**

The COURT. Haven't we been over that already?

WITNESS. We have been over it time and again.”

Record, pages 214, 215.

This testimony regarding the excellence of the grazing to the northeast of the territory in question is also

uncontradicted. It was higher, the snow melted later, the grass and other feed lasted later in the summer. The company's fence did not hold the cattle in, but it had a tendency to "steer" or drift the cattle of the company along its creek bottoms to this summer feed and prevent them from wandering off to the easterly or westerly.

This temporary usefulness of the company's outside fence as a drift fence, while the fence on the inside was being gradually constructed, and the bottoms put into enclosed pastures or cultivated fields, cannot be taken as its final purpose. There is not a line of testimony in the record questioning the *bona fides* of this ultimate purpose, namely, a completion of the partial enclosure, towards which the work was well advanced when these suits were commenced, May 31, 1911.

It is submitted that the court could not have had this undisputed testimony in mind when it lays such stress on what it calls the "undisputed fact" that "the fences are along the *outside* and not the *inside* of the cattle company's land". Nor could it have had in mind the government's own exhibit No. 1, where the *inside* fences are clearly shown,—*some eleven miles of them*.

We urge that the misstatements of the opinion in this matter, which the court finds so important, warrant a rehearing.

An equally clear mistake has been made in the court's description of the openings. There are two great gaps in the fence,—*one over a mile and a quarter long* at the northeasterly end of the territory, and the

other 3400 feet long at the southeasterly end. The opinion entirely misdescribes the larger opening, and mislocates the 3400 foot opening as in the mountainous country at the northeast.

The statement of the court as to the 3400 foot opening is as follows:

“Nor does the additional fact that in such a length of fence there is a gap of approximately thirty-four hundred feet, *left at the foot of a mountain where the country is rough*, necessarily exclude the area surrounded by the fences which lead up to the sides of the *rocky gap* from the definition of an enclosure as meant by the act. It is not enough that a would be settler can pass through *such a gap* if he follows along miles of fence and turns in and goes *over the rocky place*, or that cattle may do likewise, or that they do to some extent enter through and graze upon the lands inside.”

Opinion, page 13.

There is not a line of evidence to support this statement concerning the 3400 foot opening. On the contrary, the lower court found as follows:

“Gap No. 6 is about 3400 feet long, and is favorably and conveniently located for the passage of cattle drifting toward Rock Creek Mountains.”

Record, page 26 (small volume).

This finding is based on the testimony of the witness, McClellan, offered by the government and accepted by defendant.

“Mr. DENMAN. Q. Can you tell me through what portion of the country south of this general map here, the cattle com-

ing from the south in the spring time would naturally pass in, working up to the higher country beyond; where would they come up?

* * * * *

A. They would come up and strike Willow Creek, between Hot Creek and the point where the creek turns to the north, principally at the point where it turns to the north, and where the road shows, I suppose that is the road—no, it is not—but there is a road that runs in and drops onto the creek, just below the northeast of the quarter section corner, they would come right in that strip of country there for about three miles.

Q. What can you say as to the topography of the country right about this space near Opening No. 6, and to the south generally, with reference to its being a valley or precipitous, or what it is?

A. Well, that is valley land there. Opening 6, that is right on the valley, it is right in the valley.

Q. And is that a place where cattle would naturally congregate?

A. That is a watering place.

* * * * *

A. They would work, some of them up the creek, some would cross the creek and work up on north, to the west of the creek.

Q. What is the natural trend of the cattle in the spring-time with reference to direction of travel?

* * * * *

Mr. DENMAN. Q. The cattle that are in Humboldt, Humboldt Valley?

A. The trend is to the north."

Record, pages 254, 255.

"Q. Now, I want to ask you about the character of the country where you made this opening of half a mile here.

A. That is Willow Creek.

Q. Is there any Creek leading into that at the point of the opening?

A. Well, there is a ravine, and cow trails.

Q. Can you tell me with reference to the passage of cattle coming from the south to the north, whether or not that is a

natural place for the cattle to gather, and pass through to the north?

A. It would be; they gather in that locality.

Q. Is it not true there is a little valley running out through 32. and back around past 31, surrounding that opening at that point?

A. It is.

Q. And that valley is a natural gathering place for cattle?

A. The cattle drift into it from the south and the east.

Q. There is a road coming there, isn't there?

A. A road right by.

Q. What road is that?

A. Tuscarora road passes right by there.

Q. Isn't there another road there also?

A. Another road comes over the Tie Corral country.

Q. How is "Tie" spelled?

A. Railroad ties, that is all the name I know it by.

Q. So that cattle coming down Hot Creek, and straying to the easterly, would catch in that valley?

A. Right in that spot.

Q. And go through that opening?

A. They could, or go around the blue country, either one."

Osborn, pages 175-176.

Not only does the opinion ignore the finding of the lower court and the testimony of the government's witness (and three others) but also the government's map, which places opening No. 6 at the southeast end of the map and *alongside the main highway of the whole territory, i. e., the Midas, Tuscarora County, road.* All the court's remarks about the "would be settler" reaching this gap after "following miles of fence" and "turning in and going over a rocky place" are a cruel injustice to the company. It represents the opening as an evasion, a sham, and coming from this court is a permanent record damning its good faith.

It is submitted that on a rehearing this court would not find that the 3400 foot opening alongside the county road and main highway of the country for "would be settlers"—at a point which was the natural gathering place for cattle from the neighboring country to reach the government territory on the other side of defendant's property—warranted such a description as is given it in the opinion, nor the inference drawn.

The opinion represents the large opening at the northeast end as having North's fence across it. The language is:

"At one point a mile and a half of fence, called 'North's fence', is in bad repair and down at places. Granted that cattle will sometimes drift, more or less reluctantly, over wire fence which is down, it is nevertheless true that even a fence partly down is a visible tangible barrier, and where there are over forty miles of fence surrounding an area of public land, *with only eight or nine narrow openings therein, the fact that in a rocky rough section a mile and a half of the fence is in bad repair and partly down* does not necessarily make the surrounded area any the less enclosed, within the meaning of the statute."

Opinion, page 13.

The truth, as the government map, the findings of the lower court and all the witnesses show, is that the large opening in the northeast end of the territory *begins* at North's fence and extends to the southeast from it without any structure at all in it. And yet the opinion, given without argument, rams home the ex-

istence of a fence across this gap, and makes the defendant's defense on this point, as on the 3400 foot opening, seem a mere sham and fraud. We feel confident that this error alone should grant us a rehearing.

The adjective "narrow" conveys the idea that the other gaps left by the company are in themselves insufficient. There are in fact ten other gaps ranging from 500 to 100 feet in width. *One hundred feet is all that the decree appealed from requires.*

The opinion is also in error as to the nature of the country at the northeast portion of the map. The long snake-like barrier described on the government map was shown by the testimony of *every one* of seven witnesses not to exist in the place described. The government's witness, McClellan, tells us that instead of running in the general northwesterly and southeasterly directions, as it is drawn, to close the gap, it runs easterly and westerly and bears south of west.

McClellan says, at pages 256, 257 and 258:

"Mr. PLATT. Q. Have you ever been up in the country indicated on the plat as Toejam Mountain?

A. Yes.

Q. What is the condition of the country?

A. That is the country I was speaking of. That that is marked as 'Toejam Mountain' is a ridge lying between Toejam Creek and Siawappe Creek, that extends easterly and westerly, bearing a little bit south of west.

Q. How high is the ridge?

A. Oh, I should judge from the Siawappe Creek up to the summit, it must be a good thousand feet high. It is a mile and a half, I think, from the creek to the top of the ridge.

Q. It would not be a natural place for cattle to graze over, would it?

A. It is all fine grazing land there; they do graze over it.

Q. Is it a natural course for them to take, and graze over it?

A. Yes, that is the course they take when they get up in there and graze around, or would if allowed to do as they please, graze around Siawappe Creek, cross along the north side of that creek and drop over onto Rock Creek, and Toejam Creek, as it is called.

Q. You say they would graze there if they ever got up there?

A. They get there; I have seen them there.

Q. Is it a natural place for cattle, a natural trail for them?

A. Not exactly a natural trail; they are on the summer range when they get up in there.

* * * * *

Q. It would not be a natural course for them to take, would it?

A. Yes, the cattle that are to the northeast, over in Independence Valley, don't cross that high mountain unless they are driven across, or forced across through lack of food.

Q. They would have to be driven or forced in some way?

A. They come over the mountain that lies about 4 miles east of this country."

McClellan, pages 256, 257, 258.

Its true position is shown on defendant's map in evidence which is based on an actual survey of the land. It fills less than a fifth of the space of the gap and is nearly a mile from it.

Defendant's Ex. "A"; Tilden, pages 446 to 466, *et seq.*

A wagon could be driven over it (Thornton, p. 660). A survey showed that a railroad could be built on natural grade over the very place where the snake-like object appears (Tilden, pp. 549 to 569). Two disinterested witnesses, Mr. Lamb, the sheriff of the county, and Mr. Sheehan, the manager of the bank at Winne-

mucca, crossed the mile and a quarter gap at the northeast corner shortly before the trial. They identified all the places in the fences on the government map. Both testified that the $1\frac{1}{4}$ mile opening had easy grazing ground on both sides, with abundant summer feed. Neither *could find the barrier across opening 5 described in the government map as Toejam Mountain.*

Sheehan, page 491;

Lamb, page 335.

On cross-examination, Inspector Flocker admitted that the so-called barrier would not stop cattle (434) and that he had never been within a mile of it (p. 425). Melrose, the other government inspector, was present at the trial but was not asked any question about this barrier. The government offered no evidence to contradict the defendant's unanimous testimony that this higher country at the northeast corner of the territory in question was the natural *summer* feeding ground where the stockmen desired their cattle to go as the lower country feed was exhausted.

How unfair to the defendant is the attempt of the opinion to show that the higher country to the northeast merely completed, with the fences, a barrier to the government land, whereas in fact the fences acted as an aid to get the cattle *up to* this higher land which was the objective in summer of all the cattle of that vicinity. The fences were for the purpose of getting the cattle *through* gap No. 5, not to stop them at that point. If there had been a full argument of this case,

would this court have held that it was illegal to build on one's own land *drift fences* to shape up cattle to the summer feeding grounds? Would it have put the defendant in the position of having left openings which were a mere sham and a fraud? This is the impression the opinion leaves. It is not warranted by the facts, nor by the findings of the court below, which squarely state that the defendant was endeavoring to comply with the law.

The portion of the opinion referring to the reluctance of the Nevada range cow in passing over barb wire lying on the ground, is also not supported by the record. The fence posts of the North fence were *down*, the wires *broken*, and much of them *coiled up*.

Testimony Lamb, p. 354.

We thus see that practically every statement of fact as to the important openings and their accessibility on which the court relies for its argument that there is an enclosure, is not only absolutely unsupported by the evidence, but is squarely contradicted by the government map, the government's witnesses, our witnesses and the findings of the lower court. To recapitulate:

(1) The opinion finds the mile and half opening to have North's fence across it. North's fence is in another place, the opening unobstructed and a natural pass and feeding ground for cattle.

(2) The opinion finds the 3400 foot opening in a mountainous and inaccessible place, most difficult for the "would be settler" to reach. The fact is the opening is in a valley, the natural gathering place for

cattle, and alongside the Tuscarora Midas road, the main thoroughfare of the country.

(3) The opinion describes the company's fences as all being on the *outside* of its lands and a most damaging inference is drawn as to intent. The fact is that its lands are fenced on both sides for a large portion of their area and in process of being fenced on all sides for their entire area.

(4) The argument is made that the fencing is obstructing the settlement of 162 homesteads. The lower court finds, and the fact is, that the government land is rough, hilly and unproductive and utterly unfit for homesteading.

(5) The cattle are described as reluctantly passing over North's fence wires. The wires in fact are broken and coiled up and the reluctant Nevada steer would have to do some jumping (which we admit he could) to pass over them.

(6) The whole opinion is flavored with the suggestion that the defendant is a cattle company which has taken up the bottom lands solely to enable it to control the government grazing land between and generally acting in bad faith about it. The fact is that the company is engaged in civilizing the country, erecting great dams and irrigation works, changing range land into grain and alfalfa fields, AND THE EVIDENCE ON THIS POINT, SO EASY OF REFUTATION, IS ABSOLUTELY UNCONTRADICTED.

It is submitted that on rehearing this court may well hold that fences do not constitute an enclosure which

have between them one *unobstructed* opening of a mile and a half, and another of 3400 feet, both in natural passes for cattle, and the latter alongside the main highway, where it would hold that they do constitute an enclosure if these gaps are mere shams, filled with obstructing fences, and placed in rough and inaccessible places.

II.

THE GRANTING OF TWENTY RIGHTS OF WAY ACROSS THE GRAIN AND ALFALFA FIELDS, AND THE FENCING OF THE SAME.

It is undisputed that practically every acre in the bottoms belonging to the defendant is rich arable land. It is not disputed that a large portion of their area was fenced on the *inside* and under cultivation, and that the building of the remainder of the inside fence was under way when these suits were begun. The effect of the court's decree then must be considered with a view to the immediate use to which the lands were to be put.

The decree requires twenty openings in the fence, of a hundred feet in width, so placed that there are required thirteen in addition to the thirteen now existing. It is apparent this means that unless these openings are fenced clear through to the inside of the company's lands, they will admit everyone's cattle to the grain, alfalfa, or potato fields of the defendant. Now this effect of the decree must be construed as well as its mere words, in determining whether it is warranted by the law. The question is, can the court, in

the guise of abating fences on one's own land, having many accessible and unobstructed openings, one a mile and a half in length and another 3400 feet in length alongside the general highway, require the owner to surrender thirteen additional strips of land 100 feet wide and from a quarter of a mile to a mile and a half across its cultivated lands, to make the access of straying cattle more "convenient"?

Did Congress intend to upset the law of real property to this extent? If it did, no case has yet said so, and the opinion of the court in *Camfield v. United States* directly negatives this construction, saying:

"It is no answer to say that if such odd-numbered sections were fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections.

"So long as the individual proprietor confines his enclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor, but when, under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the government, he is guilty of an unwarrantable appropriation of that which belongs to the public at large."

Camfield v. United States, 167 U. S. 518, at 527-528.

The case of *Homer v. United States*, which is the extreme to which any case has gone, requires but one

opening in a fence *twenty-five miles* long on the outside of the defendant's land, a mere right of way of necessity. The language of the court is as follows:

“And that *such an opening* should be made in the general inclosure as will allow free ingress and egress to the public lands in question.”

Homer v. United States, 185 Fed. 741, at 747.

Even to this decision there is a vigorous dissent by Judge Van Devanter, at page 749.

This court in the case of *Thomas v. United States*, 136 Fed. 159, at page 161, clearly holds the fence an enclosure only because it did not have *one* substantial opening.

In *United States v. Johnson*, 172 Fed. 635, there were but two inaccessible openings in many miles of fence.

In no case we have examined has more than one substantial opening, conveniently located, been held necessary to make the fencing not an enclosure.

It is submitted that while there should in any event be a reargument as to the facts in this case, the proposition of law that it is the right of the government to take from its grantee these thirteen additional strips of land, over the openings already maintained, containing many acres of rich bottom, bisecting its fields in many places and destroying their continuity for tillage or grazing, and devote them to highways for the straying stock of strangers, is so startling that it is at least entitled to a full hearing before this court.

III.

INTENT.

Concerning the intent of the defendant, the opinion uses the following language :

“If it were necessary for the court to deduce an intent from the facts we should have to say that the reasonable inference to be drawn *from the situation of the fences and the fact that they were placed as they were* is that the appellant intended to maintain an enclosure of public lands. But we do not deem it material to the case.”

Opinion, page 16.

This is a most damning sentence to have written into the records and reports of this court. It is evidently based on the misapprehensions we have above pointed out and cannot in any fairness, we submit, be left in the opinion without a correction of its description of the “situation of the fences” and “where they were placed”.

Any one reading the opinion will naturally exclaim, “The land grabbers! With their so-called mile and a half gap almost closed by North’s fence, and their 3400 foot gap hidden away under a mountain in an inaccessible place! It is as plain as day they were *intending* to enclose public lands! How could anything so raw have been defended for a moment! And all their fences on the outside too. So their cattle and no one’s else could get on government land! And all those 162 homesteads just waiting for the poor settlers and their irrigation ditches!”

Our contention is that the court *should* have passed on the intent, and we are certain that the reason why the theory and cases so carefully developed in our opening brief are not considered by the opinion is because the court erroneously felt that a scheme, so patently a sham, shows its *mala fides* on its face, and that a searching consideration of the question of intent was not necessary.

But there is not a line of testimony in the case which, properly considered, lends support to any inference of *mala fides* and the findings of the lower court are clearly to the contrary.

The Supreme Court in the Camfield case had before it the opinion of the Circuit Court of Appeals holding that intent is no part of the defense under Section 1 of the Act of 1885. Instead of following the reason of the lower tribunal the *ratio decidendi* the Supreme Court is based entirely on intent. Through paragraph after paragraph it proceeds to find the sham and *mala fides* of the defendant. And it bases that *ratio decidendi* on the Massachusetts cases which make "malice" the essence of certain nuisances which the state statutes make abatable in provisions very similar to the statute now before us.

The effect of this decision is to make a tremendous extension of the right to appropriate private property without compensation. We pray that before it becomes final, argument may be had before the court worthy of the weight of the principles and the startling nature of this application in the appropriation of many acres of the appellant's land under the decree here approved.

We therefore pray that the court rehear the case; (1) that it may undo the injustice unconsciously done the defendant in the statement of facts and the deductions therefrom; (2) that it may further consider the question whether the fences constitute an enclosure in view of the real facts in the case; and (3) that it may hear argument on the question of intent as a factor in determining whether fences which have many gaps adjacent to the main thoroughfares in them do or do not constitute an enclosure under the Act of 1885.

And your petitioner will ever pray.

CHARLES R. LEWERS,
WILLIAM DENMAN,
Solicitors for Petitioner.

G. S. ARNOLD,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, William Denman, one of the solicitors for the petitioner in the foregoing petition for rehearing, do hereby certify that in my judgment this petition is well founded, and that it is not interposed for delay.

WILLIAM DENMAN,
Solicitor for Petitioner.

The errors of the opinion and the real facts appear in parallel columns in the appendix on the succeeding pages.

APPENDIX.

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“It is **not disputed** that the fences are along the **outside, and not** the inside of the cattle company's lands, so that between the fences and appellants' lands lies the large area of public domain involved here. It is impossible to gain access to this land **except by crossing land which belongs to the cattle company,*** either through certain openings in the fences purposely made by the cattle company, or the opening of **3400 feet situate in the NORTHeastern part of the tract lying at the foot of Toejam Mountain.**”

Opinion, pages 4-5.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

*There is no evidence that the land on which are North's fence and Noble's fence and the 1¼ mile gap belongs to the appellant. On the contrary it belongs to other private parties and no other contention was made by the government.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

It is not disputed that **all** the fences are **not** along the outside of the cattle company's lands, a **very considerable part of the fences being on the inside, and enclosing the company's lands into cultivated fields.** It is not disputed that **all the company's lands were in process of being thus enclosed on the inside, and the work was progressing at the time the government litigation was commenced, so that when the fencing scheme was completed, there would lie between the inside fences on appellant's lands, the large area of public domain involved here.** It is impossible to gain access to this land except by crossing land which belongs **either to the cattle company or to other private owners,** either through certain openings in the fence purposely made by the cattle company, **including an opening of 3400 feet situate on the SOUTHeastern corner of the tract, lying alongside the Tuscarora Midas road, the main thoroughfare of the country, or the opening of a mile and a quarter situate at the NORTHeastern part of the tract, lying distant about four miles from Toejam Mountain, through which pass the regular lines of cattle travel going to and from the higher summer feeding ground beyond.**

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“That is to say, the Golconda Company, by maintaining miles of fence **along only the outside** of its own eleven thousand acres and **connecting such fences with natural or other barriers**, has separated one immense tract consisting not only of eleven thousand acres belonging to it but also of twenty-six thousand acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise one hundred and sixty-two homestead entries.”

Opinion, page 12.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

That is to say, the Golconda Cattle Company, by maintaining miles of fences along **both the inside and the outside** of its own 11,000 acres, which fences were **disconnected** with any natural barriers, **but in one place left an opening of a mile and a half long**, through which passed the regular cattle trails into the higher mountain country beyond and over practically the entire area of which cattle could cross with freedom, and with another opening 3400 feet in length, alongside the main highway, in a valley which is the natural gathering place of cattle to pass on to the government land beyond, has separated one immense tract, consisting not only of 11,000 acres belonging to it but also of 26,000 acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers **with their two miles and over of openings** there is public land more than sufficient to comprise 162 homestead entries on territory that is "all rough and hilly" and "affords only a somewhat scant pasturage for about two months in early spring".

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“And where there are over forty miles of fence surrounding an area of public land, with only eight or nine narrow openings therein, the fact that in a **rocky rough section** a mile and a half of the fence is in bad repair and partly down does not necessarily make the surrounding area any the less enclosed, within the meaning of the statute. Nor does the additional fact that in such a length of fence there is a gap of approximately thirty-four hundred feet, **left at the foot of a mountain where the country is rough**, necessarily exclude the area surrounded by the fences which **lead up to the sides of the rocky gap** from the definition of an enclosure as meant by the act. It is not enough that a would-be settler can pass through **such a gap** if he **follows along miles of fence** and turns in and **goes over the rocky place**, or that cattle may do likewise, or that they do to some extent enter through and graze upon the lands inside.”

Opinion, page 13.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

And where there are over forty miles of fence surrounding an area of public land, with eight or nine openings therein, each as large or larger than the openings ordered by the decree of the lower court, the fact that in a rough rocky section there is a gap of a mile and a quarter through which the cattle have customarily passed to the feeding grounds beyond, and over which they can cross without difficulty and which is itself a natural grazing ground for cattle, does not necessarily make the surrounding area any the less enclosed within the meaning of the statute. Nor does the additional fact that in the length of fence there is a gap of approximately 3400 feet left in a natural gathering place for cattle, and alongside the country road which is the main thoroughfare of the country, necessarily include the area surrounded by the fences which lead up to the gap in this valley and alongside the road, from the definition of an enclosure as given by the act. It is not enough that a would-be settler can pass through such a gap if he follows along the county road and main highway and turns in and goes over the smooth valley, or that the cattle may do likewise, or that very large numbers of cattle of different brands coming from over fifty miles away enter through these openings and cross upon the lands inside and no cattle are shown to have been kept from the government lands or any complaint shown in that regard.

Opinion with portions in black face which are contradicted by the findings of the lower court, the government maps, as explained by the government witnesses, the defendant's map, and the uncontradicted testimony of all the witnesses, and which are supported by no testimony in the case.

“The consequences of a contrary view might lead to a practical withdrawal of much public lands from the general domain, for by building miles of fences about public lands but leaving only one or two small openings, **and one larger one, in a remote and inaccessible place,** one could obtain the benefits of an enclosure yet say he was not maintaining an enclosure and so defeat an action to have such an enclosure removed under Section 1 of the Act.”

Opinion, page 14.

“It is said that enforcement of the decree of the District Court may be an invasion of the constitutional rights of the appellant, in that it would constitute a taking of private property for public use. But under the doctrine laid down by the Supreme Court in the *Camfield* case, *supra*, the United States has a clear right to legislate for the protection of the public lands and to exercise what is called a police power to make the protection effective, even though there may be **some inconvenience** or **slight** damage to individual proprietors. There being nothing in the facts, of this case to take it out of this rule, we must hold that no rights of appellant have been infringed.”

Opinion, last paragraph.

It is submitted that the opinion cannot stand in view of the actual facts as inserted in the above portions on the opposite page.

Opinion with real facts inserted. Black faced portions are based on the findings of the lower court, the government's witnesses, the government's map, the company's map and the uncontradicted evidence of company's witnesses.

The consequences of a contrary view may lead to the practical withdrawal of much public land from the general domain, for by building miles of fences about public lands but leaving only **thirteen** openings as large or larger than those ordered by the court and two others, one a mile and a quarter long, through which passed the usual cattle trails into the higher mountains and over the whole area of which cattle have always passed and grazed, and another one 3400 feet in length, in an accessible place, alongside the county road and main highway, and in a valley which is a natural gathering place for cattle desiring to graze over the government land, one could obtain the benefits of an enclosure yet say he was not maintaining an enclosure and so defeat an action to have such an enclosure removed under section one of the act.

But under the doctrine laid down by the Supreme Court in the *Camfield* case, *supra*, the United States has clear right to legislate for the protection of the public lands by exercising what is called the police power, even though it involve taking twenty rights of way, 100 feet wide and from a quarter of a mile to a mile and a half long, which must be fenced on both sides by the owner of the land in order to prevent straying cattle from getting at his rich bottom lands planted to alfalfa and grain. There being nothing in the facts of this case to take it out of this rule, and we must hold that no rights of appellant have been infringed.

